

**LITERACY TESTS AND VOTER REQUIREMENTS IN
FEDERAL AND STATE ELECTIONS**

1658-5

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 480, S. 2750, and S. 2979

**BILLS RELATING TO LITERACY TESTS AND VOTER REQUIRE-
MENTS IN FEDERAL AND STATE ELECTIONS**

MARCH 27, 28; APRIL 5, 6, 10, 11, AND 12, 1962

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CONTENTS

Opening statement of—	
Ervin, Hon. Sam J., Jr., U.S. Senator from the State of North Carolina, chairman of the Subcommittee on Constitutional Rights.....	Page 6
Johnston, Hon. Olin D., U.S. Senator from the State of South Carolina.....	35
Keating, Hon. Kenneth B., U.S. Senator from the State of New York.....	2
Long, Hon. Edward V., U.S. Senator from the State of Missouri.....	1
Text of bills pending before the subcommittee:	
S. 480.....	7
S. 2750.....	7
S. 2979.....	8
Analysis of pending bills, prepared by American Law Division, Legislative Reference Service, Library of Congress:	
On S. 480 and S. 2750.....	9
On S. 2979.....	12
Commerce Department report on S. 2979.....	513
Justice Department report on S. 2979.....	326
Justice Department memorandum on S. 2750.....	302
U.S. Commission on Civil Rights staff memorandum on constitutionality of legislation on the subject of literacy as a requirement for voting.....	162
Statements:	
Biemiller, Andrew J., director, department of legislation, AFL-CIO, accompanied by Thomas Harris, associate general counsel.....	209
Bloch, Charles J., attorney, Macon, Ga.....	349
Case, Hon. Clifford P., U.S. Senator from the State of New Jersey...	67
Fulbright, Hon. J. W., U.S. Senator from the State of Arkansas.....	503
Gallion, Hon. MacDonald, attorney general of Alabama.....	328
Goldwater, Hon. Barry, U.S. Senator from the State of Arizona.....	362
Gray, Hon. Frederick T., member, Commission on Constitutional Government; former attorney general, State of Virginia.....	340
Griswold, Erwin, dean, Harvard Law School; Commissioner, U.S. Commission on Civil Rights; accompanied by Berl Bernhard, staff director, U.S. Commission on Civil Rights, and William Taylor, assistant staff director.....	115
Hartnett, Al, secretary-treasurer, International Union of Electrical, Radio & Machine Workers (AFL-CIO).....	379
Hill, Hon. Lister, U.S. Senator from the State of Alabama.....	63
Humphrey, Hon. Hubert H., U.S. Senator from the State of Minnesota.....	470
Javits, Hon. Jacob K., U.S. Senator from the State of New York.....	46
Johnson, Hon. Paul B., Lieutenant Governor, State of Mississippi...	394
Kennedy, Hon. Robert F., Attorney General of the United States...	261
Kuchel, Hon. Thomas H., U.S. Senator from the State of California...	505
Old, Hon. William, resident judge, Chesterfield County circuit court, Chester, Va.....	169
Rauh, Joseph, Jr., vice chairman for civil rights and civil liberties of the Americans for Democratic Action.....	453
Sparkman, Hon. John, U.S. Senator from the State of Alabama.....	101
Speiser, Lawrence, director, Washington office, American Civil Liberties Union.....	473
Stennis, Hon. John, U.S. Senator from the State of Mississippi.....	195
Talmadge, Hon. Herman E., U.S. Senator from the State of Georgia...	87
Wilkins, Roy, executive secretary of the National Association for the Advancement of Colored People, and chairman, Leadership Conference on Civil Rights.....	486
Wise, Sherwood, president, Mississippi State Bar Association.....	243

IV

CONTENTS

Letters:

Bagget, Julius H., member, McCormick County (S.C.) Board of Registration.....	Page 506
Crescenzi, Gene, attorney, chairman, Committee for Fair Voting Standards.....	507
Plaintiff's brief in the case of <i>Comacho v. Rogers</i> , submitted by Mr. Crescenzi.....	508
Gholson, Julius, superintendent, Board of Public Education, Bibb County, Ga.....	351
Goodman, Mrs. Fielder, director of primary curriculum, Bibb County, Ga.....	352
Justice Department survey of States with literacy tests.....	315-326
Decision: <i>Darby v. Daniel</i> , 168 F. Supp. 170 (1958).....	419
Justice Department information regarding voting cases.....	515
Survey of opinions of State attorneys general:	
(1) Letter of Subcommittee Chairman Sam J. Ervin, Jr., requesting opinions of the State attorneys general.....	523
(2) Opinions of State attorneys general:	
Alaska.....	524
California.....	525
Connecticut.....	526
Florida.....	527
Illinois.....	528
Indiana.....	528
Kentucky.....	529
Louisiana.....	530
Maine.....	543
Massachusetts.....	544
Michigan.....	550
Minnesota.....	552
Nevada.....	555
New Mexico.....	558
New York.....	559
North Carolina.....	559
North Dakota.....	563
Oregon.....	564
Pennsylvania.....	564
Rhode Island.....	566
South Dakota.....	566
Utah.....	567
Vermont.....	569
Virginia.....	569
Wisconsin.....	573
Survey of opinions of constitutional law professors:	
(1) Letter of Subcommittee Chairman Sam J. Ervin, Jr., sent to the deans of the American Bar Association's list of approved law schools.....	573
(2) Opinions of constitutional law professors:	
Alabama University Law School: C. Dallas Sands.....	574
Boston College Law School: John D. O'Reilly, Jr.....	576
Chicago-Kent College of Law: Alfred Avins.....	576
Creighton University Law School: Manfred Pieck.....	579
Denver University Law Center: Morton Gitelman.....	583
DePaul University Law Center: Robert G. Weclaw.....	586
Dickinson School of Law: Donald J. Farage.....	587
Duke University Law School: Douglas B. Maggs.....	589
Duquesne University School of Law: Walter A. Rafalko.....	597
George Washington University Law School: Robert G. Dixon, Jr.....	598
Georgetown University Law Center: Chester James Antieau.....	614
Gonzaga University Law School: Rev. Francis James Conklin.....	614
Harvard University Law School: Arthur E. Sutherland.....	627
Hastings College of Law, University of California: Brooks Cox and J. Warren Madden.....	633
Loyola University Law School: Richard V. Carpenter.....	634
Michigan University Law School: Paul G. Kauper.....	635

Survey of opinions of constitutional law professors—Continued	
(2) Opinions of constitutional law professors—Continued	
Nebraska University College of Law: John M. Gradwohl and Wallace M. Rudolph	640
North Dakota University Law School: Charles Liebert Crum	646
Notre Dame Law School: Roger Paul Peters	649
Oklahoma University Law School: Maurice H. Merrill	650
Richmond (Va.) University School of Law: William J. Muse	658
Rutgers University Law School: Frederick K. Beutel	658
Southern University Law School: Vanue B. Lacour	659
Western Reserve University Law School: Oliver Schroeder, Jr.	660
West Virginia University Law School: Stanley E. Dadisman	662
Yale University Law School: Alexander M. Bickel and Louis H. Pollak	663
Article: Constitutional of Federal Legislation To Abolish Literacy Tests, by Kathryn Werdeger	601
Views of State Governors:	
Letter of Subcommittee Chairman Sam J. Ervin, Jr., sent to Governors of States which have a literacy test as a prerequisite for voting	665
Replies from State Governors:	
Alaska, Hon. William A. Egan, Governor	665
Arizona, Hon. Paul Fannin, Governor	665
California, Hon. Edmund G. Brown, Governor	666
Connecticut, Hon. John Dempsey, Governor	666
Delaware, Hon. Elbert N. Carvel, Governor	666
Georgia, Hon. S. Ernest Vandiver, Governor	667
Maine, Hon. John H. Reed, Governor	667
Massachusetts, Hon. John A. Volpe, Governor	667
Mississippi, Hon. Ross R. Barnett, Governor	667
New York, Hon. Nelson A. Rockefeller, Governor	669
North Carolina, Hon. Terry Sanford, Governor	669
Oregon, Hon. Mark O. Hatfield, Governor	670
Virginia, Hon. Albertis S. Harrison, Jr., Governor	671
Washington, Hon. Albert D. Rosellini, Governor	671
Wyoming, Hon. Jack A. Gage, Governor	672
Background information:	
Report by U.S. Commission on Civil Rights, 1959 (excerpt) "Proposal for a Constitutional Amendment to Establish Universal Suffrage"	672
Report by U.S. Commission on Civil Rights on Voting (1961) (excerpt) "Recommendations" (pp. 139-142)	674
Federal statutes concerning voting rights:	
42 U.S.C. 1971	685
42 U.S.C. 1983	686
18 U.S.C. 241 and 242	686
Civil Rights Act of 1957	676
Civil Rights Act of 1960	680
U.S. Constitution, articles and amendments relevant to a study of S. 480, S. 2750, and S. 2979	687

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

TUESDAY, MARCH 27, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE OF THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin, Johnston, McClellan, Long, Wiley, Hruska, and Keating.

Also present: William A. Creech, chief counsel and staff director, and Bernard Waters, of minority counsel.

Senator ERVIN. The subcommittee will come to order.

The first thing the subcommittee chairman will do is give other members of the subcommittee the opportunity to read any statements they may have. I will accord the right first to the Senator from Wisconsin.

Senator WILEY. I haven't any statement. My only philosophy is, we are here to hear—we are not here to tell. If the witnesses have something to give us that is worthwhile, we are ready to hear them. That is the way I feel about it. Having practiced law for more than 30 years, I never felt it was the business of the court or the Congress to reach any decision until after the evidence was submitted. So I trust that we will get all the evidence in, and then we will arrive at our decision.

Senator ERVIN. Senator Long, do you have a statement?

STATEMENT BY U.S. SENATOR EDWARD V. LONG

Senator LONG. Mr. Chairman, I have a very short statement and I appreciate the opportunity to present it. The Congress, in recent years, has enacted legislation on two occasions in the field of civil rights. The main direction of this legislation has been to eliminate discrimination because of race or color in the field of voting. The 1961 report of the U.S. Civil Rights Commission indicates that the 1957 and the 1960 laws have provided the tools to accomplish a great deal in securing the right to vote to many who have been disenfranchised because of race or color. However, there remain a number of methods which can be used and are used to withhold the right to vote from many Americans in violation of the Constitution.

Foremost among these is the so-called literacy or intelligence test. The 1957 and 1960 civil rights laws are not adequate to meet the tre-

mendous problems posed by the misuse of such tests or requirements. Because of this, legislation has been suggested and introduced which would provide that no person can be denied the right to vote on the basis of a literacy test, if he has completed six grades of education in an accredited school.

In my opinion, congressional action along this line is necessary. During these hearings, I hope we will receive testimony with regard to these tests and how they are administered. We will undoubtedly learn further of their use and their misuse. We will receive testimony as to what legislation should be adopted, what legislation can be adopted, and the form it should take. I welcome the opportunity to hear the witnesses scheduled, as suggested by the distinguished Senator from Wisconsin.

The vote is a most basic right of our democratic form of government. The Congress must take whatever action is necessary to insure that all Americans enjoy the right, free from discrimination. We have received the report of the Civil Rights Commission, and the time is at hand to move forward in this area.

Thank you, Mr. Chairman.

Senator ERVIN. Senator Keating, do you have a statement?

STATEMENT BY U.S. SENATOR KENNETH B. KEATING

Senator KEATING. Yes, Mr. Chairman. I am very pleased we are having these hearings on an important phase of the field of civil rights. I want to express at the outset my gratitude to the chairman for complying with my request to broaden the original scope of these hearings to include the voting rights bill, S. 2979, which I introduced last week to reflect all of the recommendations of the Commission on Civil Rights in the field of voting. I appreciate the chairman's cooperation in this regard and am hopeful that this action will make it possible for the committee to recommend more than just a literacy bill to the Senate after these hearings are concluded.

However, there are many pressing civil rights problems apart from voting and I must express my regret that the subcommittee has not seen fit to schedule hearings on these issues as well. The Commission on Civil Rights which we created in 1957 is directed to submit to the President and the Congress comprehensive reports on the status of civil rights and recommendations for removing obstacles to the enjoyment by every American of his rights under the Constitution. The Commission is composed of outstanding men. It has done its work extremely well despite many roadblocks which it has had to overcome. It has made recommendations not only in the field of voting but in the fields of education, employment, housing, and the administration of justice.

In my opinion, both the President and the Congress have failed to give the Commission's program the backing it deserves. This attitude undermines the Commission's efforts, but even more importantly, it forfeits an opportunity to build meaningful progress in the field of civil rights on the foundation the Commission has outlined.

I would prefer to proceed on the basis of a record made by one of our own committees, but if this is not possible, I know there is ample documentation in the reports of the Commission itself to support

favorable consideration of its recommendations in all respects. It is my expectation that other civil rights proposals will be offered on the floor of the Senate, and I shall give my full support to such efforts.

Discrimination at the polls has few defenders. No one who believes in the Constitution can justify denying any qualified citizen the right to vote because of his race. The fact is, however, that such discrimination is the rule, not the exception in some areas of our Nation. And on the basis of a distorted view of States rights there is still tremendous resistance to every effort to vouchsafe the franchise for all Americans.

I believe in States rights but under the Constitution no State has the right to discriminate at the polls because of race or deny its citizens the equal protection of the laws. There are States wrongs as well as States rights and I can conceive of no greater wrong by any State than the denial to its inhabitants of the right to participate in the electoral process. Indeed the claim of States rights has a somewhat hollow ring when it emanates from areas in which only a relatively small percentage of the States inhabitants can participate in the choice of their representatives. Claims that we are infringing upon the traditions and preferences of the people in these areas are very weak when in some cases more than a majority cannot express their wishes at election time. Extension of the franchise will strengthen not weaken States rights by making certain that the States really represent the will of all the people and not the relatively few who can overcome a dozen obstacles to voting.

It would be well to outline for the record some of the roadblocks to registration and voting by Negroes which the Commission on Civil Rights uncovered in the course of its hearings and investigations. One of these is discussed under the heading "Finding the Registrar." This simple but effective device for discouraging voting merely requires that the registrar not be available in areas in which Negroes may want to register. When the registrars are unavoidably present they have been known to direct Negro applicants to wait at locked doors or to visit the local sheriff.

Sometimes a slowdown technique is employed. This is set in motion by mass challenges to already registered Negro voters. When the Negroes appear to protest they have to wait on long lines while the registrars drink cokes or simply gaze at the scenery out the window. White persons who come to register during this same period are waited on as soon as they arrive.

I am referring, Mr. Chairman, to evidence in the report of the Commission on Civil Rights.

Another effective roadblock to registration is the voucher system. This requires the applicant to produce two registered voters in his precinct who will swear to his identity. In areas in which there are no Negroes registered—and there are such places in the United States—this is an impossible requirement for Negro voters to meet. As a result, Negroes who may have lived all their lives in the community and be well known to their neighbors and even to the registration officials are denied the right to register because they cannot prove their identity to the registrar's satisfaction.

Another effective technique is to disqualify Negroes for the most minor errors on their registration forms. For example, one applicant was rejected because he underlined rather than circled "Mr." on the printed form. Others are rejected for errors in computing their

age. This is not just a matter of stating how old you are, but calculating your age in years, months and days. Some applicants who included the day on which they were applying were disqualified by a registrar who decided that the day of registration should not be included. To illustrate the difficulty and arbitrariness of this requirement, the Commission asked a registrar who was a witness at one of its hearings in Louisiana to demonstrate the system by calculating her own age. She miscalculated by almost a month. In many cases the applicants are not informed of these errors with the result that they have no opportunity to appeal the registrar's decision or correct their forms.

Literacy tests in various forms scored entirely on the basis of the registrar's judgment are another way of disqualifying Negro voters. One applicant who defined treason as "aiding and abetting an enemy in time of war," for example, was rejected by a registrar who simply told the applicant that the registrar didn't think the applicant "understood." On the other hand, a white applicant who was asked to interpret a provision of the Louisiana constitution relating to freedom of speech and answered "I agree," was found qualified. Other registrars dispense with these tests entirely when dealing with white applicants.

Outright intimidation is a less subtle method of preventing Negroes from registering and voting. These include economic reprisals, threats, and official interrogations. The Commission's report leaves no doubt that there are areas in this country in which Negroes are afraid to register and vote and for good reason. Sometimes this intimidation comes from government agents such as the local sheriff, other items from the Ku Klux Klan and other extremist groups. In an area ironically called Liberty County in the State of Florida, after a group of Negroes registered, crosses were burned and fire bombs hurled upon their property. They received abusive and threatening phone calls late at night. Finally all but one removed their names from the books and their troubles ended. The one holdout was forced to leave Liberty County. An investigation of this situation was ordered by the Governor of Florida but the investigators concluded that the actions of the Negroes were voluntary.

The success of these tactics is revealed by some of the statistical information compiled by the Commission. Here are some of the most flagrant illustrations:

(1) In two Alabama counties no Negroes are registered to vote, although Negroes represent 80.7 percent of the total population in one of them, and 77.9 percent in the other. In 22 other Alabama counties less than 10 percent of the voting age Negroes are registered. In the State as a whole, only 7.1 percent of the registered voters are Negroes and 92.9 percent are white while 73.8 percent of the eligible voters are white and 26.2 percent are Negro.

(2) In Georgia there are no Negroes registered to vote in six counties, in two of which Negroes constitute more than half of the county's total population. In three other counties, less than 10 percent of the voting-age Negroes are registered. The Negro voting-age population in these counties is 25.9, 45, and 55.7 percent, respectively.

(3) In Louisiana there are four parishes in which no Negroes are registered to vote. The Negro population in these parishes is 61.2,

64.9, 65, and 66.1 percent, respectively. In 15 other parishes in which the Negro population ranges between 18.4 and 50.8 percent of the total voting-age population, less than 10 percent of the voting-age Negroes are registered.

(4) In Mississippi, there are 13 counties in which no Negroes are registered. Negroes represent from 9.9 to 68 percent of the total voting-age population in these counties. In 42 other counties in Mississippi, less than 10 percent of the voting-age Negroes are registered. In these counties the Negro voting-age population ranges between 4.3 and 74.3 percent of the total voting-age population. Figures for almost all of Mississippi indicate that only 6.2 percent of the voting-age Negroes are registered to vote while Negroes constitute approximately 37 percent of the State's total population.

These facts make it evident that something must be done to further protect the right to vote in America. We cannot condone these conditions without doing violence to the spirit and intent of the 15th amendment. Nor can we rely on the States to safeguard the electoral process when we know that in many cases State officials are parties to the most serious voting deprivations. Congress has the authority and, in my opinion, the duty to enact whatever laws are needed to give full application to the command of the Constitution barring any abridgement of the right to vote on account of race, color, or previous condition of servitude.

Specifically, I believe that we should enact the provisions of S. 2979 which, as I have indicated, was introduced to carry out all of the legislative recommendations of the Commission on Civil Rights in the field of voting. This legislation is cosponsored by Senators Douglas, Clark, Javits, Hart, Scott, Humphrey, Long of Missouri, Case of New Jersey, Dirksen, Morse, Bush, Kuchel, Proxmire, and Williams of New Jersey. No matter what action this subcommittee and the full Committee on the Judiciary may recommend, I intend to offer all the provisions of this bill as amendments to any voting bill under consideration in the Senate.

S. 2979 would close the loopholes in the existing statutes on voting. It would prohibit any State from denying to its citizens the right to register and vote for any cause except inability to meet reasonable age or length-of-residence requirements uniformly applied, legal confinement at the time of registration or election, or conviction of a felony. In any State in which a literacy test was administered, it would be sufficient for qualification that the elector have completed at least six grades of formal education. It would prohibit any arbitrary action or (where there is a duty to act) arbitrary inaction, which deprives or threatens to deprive any person of the right to register and vote. It would provide for a decennial nationwide compilation of registration and voting statistics for every State including the extent to which eligible inhabitants in each State have voted. These proposals are by no means radical. They fall far short of other suggestions which have been made, such as the conduct of elections by the Federal Government. But they are vitally important recommendations based on years of intensive study and investigation by the Commission we set up to advise the President and the Congress on what must be done to protect the constitutional rights of all Americans.

The literacy bills now pending before this subcommittee fall short of these recommendations in several important respects. The admin-

istration bill, S. 2750, is limited unnecessarily to Federal elections—the 15th amendment has no such limitation. Furthermore, S. 2750 deals only with intimidation, threats and coercion, and thereby omits the more subtle forms of discrimination such as absent registrars which are in vogue. And it makes no provision for the census report on registration and voting statistics which the Commission has urged.

In conclusion, it should be reiterated that voting is only one of the several areas in which the Commission has made specific recommendation for executive and legislative action. It has not given this subject any higher priority than education, employment, housing, or the administration of justice. Nor has it singled out discriminatory literacy tests or poll taxes for more prompt action than other forms of abuse which it has documented. We will not be doing justice to the Commission's work if we limit ourselves to these issues and ignore the other equally pressing problems to which it has offered suggested solutions. Certainly this Congress must do more than enact a literacy bill and a poll tax bill or amendment if it is to make a significant contribution to strengthening civil rights in America.

At the same time, I do believe that the most reprehensible form of discrimination is that which denies Americans equality at the polling booth. The right to choose one's representatives is at the very heart of our form of government. Under the plain words of the 14th amendment, a State must be denied representatives in Congress for any male inhabitants over 21 that are disenfranchised. I would much rather that people voted than that States lost representatives—and this is the thrust of the legislation on which I am urging action. But if these measures do not succeed in drastically remedying the existing patterns, it is certain that there will be increased pressure to invoke this provision of the Constitution and reduce the representation of States which have for years systematically excluded large portions of their inhabitants from the exercise of the franchise.

Extension, not restriction, of the right to vote should be the goal of everyone who believes in our constitutional system. I hope these hearings will convince even the most reluctant among us of the need and justification for a prompt response to the threat that now exists to the free exercise of the franchise in our Republic.

I thank you, Mr. Chairman.

Senator ERVIN. I wish to make a statement, and I would like to inform my colleagues of the subcommittee that my statement is not very short. I would also like to tell them it is not in the nature of a filibuster. But it necessarily has to be of some length, because the constitutional inequities and infirmities in each of these three bills are so great and so numerous, it requires some time to point them out.

I have given much of this information to my colleagues, so if any of them do not wish to be further informed, they only have to stay here for a few minutes.

OPENING STATEMENT OF SENATOR SAM J. ERVIN

Today the Subcommittee on Constitutional Rights begins 6 days of hearings on three bills which concern literacy qualifications as a prerequisite for registering to vote. The texts of these bills, S. 480,

S. 2750, and S. 2079, and analyses of them will be placed at this point in the record:

[S. 480, 87th Cong., 1st sess.]

A BILL To prohibit the application of unreasonable literacy requirements with respect to the right to vote

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Congress finds that the right to vote is fundamental to free, democratic government and that it continues to be the responsibility of all Federal Government to secure and protect this right against all unreasonable and arbitrary restrictions.

(b) The Congress further finds that the right to vote of many persons has been subjected to arbitrary and unreasonable restrictions on account of race or color; that tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color; and that laws presently in effect are inadequate to assure that all qualified persons shall enjoy this essential right without discrimination on account of race or color.

(c) The Congress further finds that illiteracy is rapidly disappearing in the United States; that the quality of elementary education furnished by the Nation's schools is of high caliber; that persons completing six grades of education in a State-accredited school can reasonably be expected to be literate; that a literate electorate can be assured by affording the right to vote to any otherwise qualified person who has completed six grades of education; and that any test of literacy that denies the right to vote to any person who has completed six grades of education is arbitrary and unreasonable.

(d) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to make effective the guarantees of the Constitution, particularly those contained in the fourteenth and fifteenth amendments, by eliminating or preventing arbitrary and unreasonable restrictions on the franchise which occur through the denial of the right to vote to persons with at least six grades of education and which exist in order to effectuate denials of the right to vote on account of race or color.

Sec. 2. Subsection (a) of section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended, is further amended to read as follows:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude, and without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy; any constitution, law, custom, usage, or regulation of any State or territory, or by or under its authority, to the contrary notwithstanding. 'Arbitrary or unreasonable test, standard, or practice with respect to literacy' shall mean any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia."

[S. 2750, 87th Cong., 2d sess.]

A BILL To protect the right to vote in Federal elections free from arbitrary discrimination by literacy tests or other means

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) Congress finds that it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials.

(b) Congress further finds that the right to vote in Federal elections should be maintained free from discrimination and other corrupt influence.

(c) Congress further finds that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote.

(d) Congress further finds that education in the United States is such that persons who have completed six primary grades in a public school or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship.

(e) Congress further finds that large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used; that these citizens are well qualified to exercise the franchise; that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources; that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process.

(f) Under article I, section 4 of the Constitution; section 5 of the fourteenth amendment, and section 2 of the fifteenth amendment; and its power to protect the integrity of the Federal electoral process, Congress has the duty to provide against the abuses which presently exist.

SEC. 2. Subsection (b) of section 2004 of the Revised Statutes (42 U.S.C. 1971) is amended to read as follows:

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose in any Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election. 'Deprivation of the right to vote' shall include but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

"Federal election' means any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions."

SEC. 3. If any part or provision of this Act is held invalid, all other parts or provisions shall remain in effect. If a part or provision of this Act is held invalid in one or more of its applications, the part or provision shall remain in effect in all other applications.

[S. 2979, 87th Cong., 2d sess.]

A BILL To further secure and protect the rights of citizens to vote in Federal and State elections

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Voting Rights Act of 1962".

VOTER QUALIFICATIONS

SEC. 2. (a) The Congress hereby finds—

(1) that qualifications prescribed by State laws for voting, or registering to vote, in Federal and State elections, other than qualifications based upon age, residence, freedom from confinement, and freedom from conviction of a crime, are susceptible of use, and have been used, to deny citizens the right to vote, because of their race or color; and

(2) that the enactment of this section by the Congress is necessary and proper to carry out the powers conferred upon it by section 5 of the fourteenth amendment and by section 2 of the fifteenth amendment to the Constitution of the United States.

(b) Except as provided in section 3 of this Act, the right of citizens of the United States to vote, to register or otherwise qualify to vote, and to have their vote counted in any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, or presidential elector, for the office of Member of the Senate of the

United States or Member of, or Resident Commissioner in, the House of Representatives of the United States, or for any office established by or under the constitution or laws of any State shall not be denied, abridged, or interfered with by the United States or by any State for any cause except for the following reasons, uniformly applied within the State and its political subdivisions to all persons:

- (1) inability to meet reasonable age requirements;
- (2) inability to meet reasonable requirements as to length of residence within the State and its political subdivisions;
- (3) legal confinement at the time of the election or registration; and
- (4) conviction of a felony.

LITERACY TESTS

SEC. 3. In any case in which, under the laws of any State, any literacy test or any other test designed to assure a person's ability to read and understand is administered in order to determine whether a person is qualified to vote, or to register to vote, in any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, or presidential elector, for the office of Member of the Senate of the United States or Member of, or Resident Commissioner in, the House of Representatives of the United States, or for any office established by or under the constitution or laws of such State, the successful completion of six or more grades of formal education by such person shall satisfy all the requirements of any such test.

DEPRIVATION OF RIGHT TO VOTE THROUGH ARBITRARY ACTION OR INACTION

SEC. 4. Subsection (b) of section 2004 of the Revised Statutes, as amended (42 U.S.C. 1971), is amended by adding at the end thereof the following new sentence: "No person, whether acting under color of law or otherwise, shall by arbitrary action, or by arbitrary inaction, deny, abridge, or interfere with, or threaten to deny, abridge, or interfere with, the right of any other person to vote, or to register to vote, and to have his vote counted for any candidate for any office enumerated in the preceding sentence at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate."

COMPILATION OF REGISTRATION AND VOTING STATISTICS

SEC. 5. (a) The Director of the Census shall, as soon as possible after the enactment of this Act, compile comprehensive information and statistics relating to the registration of voters in each State and the number of registered voters in each State who vote in elections held in each State. Such statistics shall include—

- (1) the number of persons of voting age in each State, classified by race, color, and national origin, who are registered to vote; and

- (2) insofar as it is possible to ascertain, the number of persons of each such classification who have voted in any election since January 1, 1960.

(b) Commencing with the next decennial census after the enactment of this Act, the information and statistics referred to in subsection (a) shall be compiled as a part of each decennial census.

MEMORANDUM

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., March 7, 1962.

To: Senate Constitutional Rights Subcommittee, Senate Judiciary Committee.
From: American Law Division.

Subject: Analysis of S. 480 and S. 2750, 87th Congress—Literacy tests in voting.

Reference is made to your request for an analysis of S. 480, introduced by Senator Javits and others, and S. 2750, introduced by Senators Mansfield and Dirksen. Both bills relate, generally, to prohibiting unreasonable literacy tests as requirements with respect to the right to vote.

The following paragraphs will describe the provisions of the bills under various subject headings:

PREAMBLE—FINDINGS OF CONGRESS

Right to vote

S. 480(a): States that the right to vote is fundamental in a system of free government.

S. 2750(a): States that it is essential to our form of government that all qualified citizens have the opportunity to vote.

Protection against discrimination

S. 480(a): States that it "continues to be" the responsibility of the Federal Government to protect the right to vote against unreasonable restrictions.

S. 2750(b): States that the right to vote in Federal elections should be maintained free from discrimination.

Discrimination on account of race or color—Literacy test

S. 480(b): States that the right to vote of many persons has been subjected to arbitrary and unreasonable restrictions on account of race or color; that literacy tests have been used extensively for denying the right to vote to otherwise qualified persons on account of race or color; and that present laws are inadequate to assure the right to vote to qualified persons.

S. 2750(c): Substantially similar to paragraph (b) of S. 480, but with the phraseology, "Literacy tests and other performance examinations."

Literacy standard—Completion of six grades of school

S. 480(c): States that the caliber of the Nation's schools is such that persons completing six grades of education in a State-accredited school can reasonably be expected to be literate, and that any test of literacy that denies the right to vote to any person who has completed six grades of education is arbitrary and unreasonable.

S. 2750(d): Substantially similar—a person who has completed six grades of a public or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy.

Spanish-language citizens

S. 480: No provision.

S. 2750(e): States that U.S. citizens with Spanish language education are deprived of the right to vote in the States; that they are well qualified to vote; that information to assist them in the intelligent exercise of the franchise is readily available; and that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from voting.

Necessity for legislation

S. 480(d): States that legislation is necessary to make effective the guarantees contained in the 14th and 15th amendments by eliminating unreasonable restrictions on the right to vote, which occurs through denial of the right to persons with at least six grades of education and which exist in order to effectuate denials of the right to vote on account of race or color.

S. 2750(f): States that under (1) article I, section 4, of the Constitution ("The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."), (2) section 5 of the 14th amendment (the enforcement section), (3) section 2 of the 15th amendment (the enforcement section), and (4) its power to protect the integrity of the Federal electoral process, Congress has the duty to provide against the abuses which presently exist.

SUBSTANTIVE PROVISIONS

Existing law to be amended

S. 480 (sec. 2): Amends title 42, section 1971(a), United States Code, by enlarging the scope of the section. The existing section 1971(a) was derived from the Enforcement Act of May 31, 1870 (16 Stat. 140), was first codified as Revised Statute 2004(a), and was then codified in its existing form. It was left unchanged by the Civil Rights Acts of 1957 and 1960 (71 Stat. 637, and 74 Stat. 90, respectively). It declares that all citizens of the United States who are otherwise qualified by law to vote at any election, shall be entitled to vote "without distinction of race, color, or previous condition of servitude; any constitution,

law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." It is the statutory form of the 15th amendment (*Neal v. Delaware*, 103 U.S. 370 (1880); *U.S. v. Raines*, 362 U.S. 17 (1960)).

S. 2750 (sec. 2): Amends title 42, section 1971(b), United States Code, by enlarging the scope of the subsection. Existing section 1971(b), is entitled, "Intimidation, threats, coercion," and declares that no person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce, any person for the purpose of interfering with the right to vote in any Federal election, including primaries. It was enacted into law by the Civil Rights Act of 1957, and rests upon the authority of *U.S. v. Classic*, 313 U.S. 299 (1941) as well as article I, section 4 (see *U.S. v. McElveen* (D.C. La.) 177 F. Supp. 355 (1959)). As set forth in House Report 291, 85th Congress, 1st session, "The doctrine in that case (i.e., *U.S. v. Classic*) establishes the authority in Congress to legislate concerning any and all elections affecting Federal offices, whether general, special, or primary * * *" and, "Insofar as the right of Congress to protect voters in elections for Federal offices from interference by action of private individuals, as distinguished from official action under the color of law, is concerned, again the ruling in the case of *U.S. v. Classic*, supra, is controlling. Under that ruling the right to choose "is a right secured by the Constitution * * * and since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of States, supra."

Thus, the existing subsection (b) of section 1971, title 42 United States Code, is declared to rest upon article I, section 4, of the Constitution, and the power of Congress to protect the integrity of the electoral process (*U.S. v. Classic*, supra).

Neither 1971 (a) nor (b) expressly, provides any legal remedy; they merely declare a right. Their enforcement depends upon other sections in the code: criminal provisions (18 U.S.C. 241, 242); civil actions by private persons (42 U.S.C. 1983) and, civil actions by the Attorney General (42 U.S.C. 1971(c)).

Amendments sought to be effected

S. 480: Rewrites 42 United States Code 1971(a), by providing that all citizens shall be entitled to vote in any election, without distinction of race, color, or previous condition of servitude, and without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy; any constitution, law, etc., of any State to the contrary notwithstanding.

"Arbitrary or unreasonable test, standard, or practice with respect to literacy," is defined to mean any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the six primary grades in a school accredited by any State or by the District of Columbia.

This amendment presumably would rest upon the 15th amendment and the equal protection clause of the 14th amendment.

It would establish a maximum literacy requirement in all States that impose such tests (some 19), of 6 years of school. Anything over that would constitute an arbitrary or unreasonable test, and would contravene the bill.

It would apply to all elections. It would apply to persons who complete the sixth grade of an accredited school only in any State or the District of Columbia. To all intents and purposes it would not thus be applicable to Spanish-language citizens.

Since the bill, however, refers to "accredited school," it presumably includes those private as well as public schools which meet its standard.

By including within the term "unreasonable test," any requirement designed to determine literacy, comprehension, intelligence, etc., it could probably be applied in such circumstances as those involving so-called "blank registrations," writing from dictation, etc.

S. 2750: Rewrites 42 United States Code 1971(b), by providing that no person shall coerce, etc., another in his attempt to vote in a Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election.

"Deprivation of the right to vote" is defined as including, but not being limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated, and (2) the denial to any

person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

Federal election includes primaries.

The bill would do two things (although it is not necessarily limited to these since the emphasis is on deprivation of the right to vote (not literacy) in any Federal election). The first is that it would prohibit as respects voting in Federal elections, all discriminatory practices whereby unequal standards are applied to persons similarly situated. The basis for this provision presumably is the equal protection clause of the 14th amendment, but only insofar as State action is concerned (see *Civil Rights* cases, 100 U.S. 3 (1883)). The second would be the creation, as respects any Federal election, of maximum literacy requirements of the completion of 6 years of education. The basis for this provision presumably is article I, section 4 of the Constitution, and the power of Congress to protect the integrity of the Federal electoral process.

The inclusion of subprovision (1) respecting application of unequal standards, makes the bill considerably broader than S. 480, since this provision might be construed to reach such elements of the electoral process as absentee voting regulations, etc.

The bill would apply only to Federal, not to all elections.

It would create a maximum literacy requirement of the completion of six grades of education in any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico. The inclusion of Puerto Rico incorporates Spanish-language educated citizens within the terms of the bill, and the reference to territories, although seemingly broader in scope, probably would refer only to Spanish-language educated citizens in any territories the United States might acquire. The restriction in the preamble of the findings of Congress in this respect, would probably limit the application of the bill to this class of citizens.

The bill, like S. 480, could be construed to apply to tests other than those of a strict literacy nature, such as writing from dictation. The provision, "performance in any examination, whether for literacy or otherwise," would seem to be broad enough to encompass such tests.

No attempt has been made herein to deal with the constitutional questions raised by both bills.

In brief, the major differences between S. 480 and S. 2750 are:

(1) S. 480 presumably rests on the 14th and 15th amendments and applies to all elections; S. 2750, in its literacy test provision, presumably rests on article I, section 4, and *United States v. Classic* (*supra*). The bill itself relates only to Federal elections;

(2) S. 2750 includes an "unequal treatment" clause, presumably resting on the 14th amendment (as conditioned by the *Civil Rights* cases, see *supra*, and others) and is broader in scope, in this respect, than S. 480;

(3) S. 2750 includes Spanish-language educated citizens within the scope of its provisions. S. 480 does not.

ROBERT L. TIENKEN, *Legislative Attorney.*

MEMORANDUM

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., March 23, 1962.

To: Senate Constitutional Rights Subcommittee, Senate Judiciary Committee.
From: American Law Division.

Subject: Analysis of S. 2079, a bill to further secure and protect the rights of citizens to vote in Federal and State elections.

Reference is made to your request for an analysis of S. 2079, introduced by Senator Keating and others. The bill relates to securing and protecting the rights of citizens to vote in Federal and State elections, and is entitled the "Federal Voting Rights Act of 1962."

The following paragraphs will describe the provisions of the bill according to its sections:

VOTES QUALIFICATIONS

Section 2(a)(1): States that Congress finds that qualifications prescribed by State laws for voting or registration in Federal and State elections, other than qualifications based on age, residence, freedom from confinement, and freedom from conviction of a crime, are susceptible of use, and have been used, to deny citizens the right to vote, because of their race or color.

Section 2(a)(2): States that Congress determines that the constitutional sources of its power to enact section 2 of the bill are section 5 of the 14th amendment (the enforcement provision—to enforce the equal protection clause in this case), and section 2 of the 15th amendment.

The section by itself does not amend nor is it related to any existing provision of Federal law.

Section 2(b): Provides that the right of citizens of the United States to vote, to register or otherwise qualify to vote, and have their vote counted at any Federal or State elections (including special elections and primaries), shall not be denied, abridged, or interfered with by the United States or by any State for any cause except for the following reasons, uniformly applied within the State and its political subdivisions to all persons—

- (1) inability to meet reasonable age requirements;
- (2) inability to meet reasonable requirements as to length of residence within the State and its political subdivisions;
- (3) legal confinement at the time of the election or registration; and
- (4) conviction of a felony.

Excepted from the application of this subsection are literacy tests which are the subject of section 3 of the bill.

This section presumably would eliminate such conditions among others, restricting the privilege of voting, now applied by the States as—

- (1) poll tax and property qualifications;
- (2) loyalty oaths (for elections of State officials);
- (3) pauper and vagrancy tests;
- (4) rules on dishonorably discharged soldiers;
- (5) laws on dueling; and
- (6) rules on mental disability except where the person is under legal confinement.

LITERACY TESTS

Section 3: Provides that where any literacy test (tests “designed to assure a person's ability to read and understand”) is administered in respect to the qualification to vote, or to register to vote, in any Federal or State elections (including special elections and primaries), the “successful completion of six or more grades of formal education by such person shall satisfy all the requirements of any such test.”

The section does not include a provision on a constitutional source as in the case of section 2, nor does it amend or is it related to any provision of existing law.

It does not define the term “formal education” so as to relate such education to a school system.

DEPRIVATION OF RIGHT TO VOTE THROUGH ARBITRARY ACTION OR INACTION

Section 4: Amends section 131(b) of the Civil Rights Act of 1957 (42 U.S.C. 1971(b)) by adding a new sentence at the end thereof. It provides that no person acting under color of law or otherwise “shall by arbitrary action, or by arbitrary inaction” deny, abridge, or interfere with or threaten to interfere with the right to vote in Federal elections (including primaries for such elections).

Title 42, United States Code, section 1971(b) declares that no person, acting under color of law or otherwise, shall intimidate, coerce, or attempt to intimidate, threaten, or coerce, any person for the purpose of interfering with the right to vote in any Federal election including primaries.

The constitutional sources of authority for the enactment of this section of the bill are presumably the power of Congress to legislate as to the manner of holding Federal elections (art. I, sec. 4 of the Constitution), and its power to protect the integrity of the Federal electoral process (*U.S. v. Classic*, 313 U.S. 209 (1941)). (See analysis of S. 480 and S. 2760.)

None of the sections (2, 3, or 4) of the bill expressly provides any legal remedy. They are declaratory (as is 42 U.S.C. 1971(b) which sec. 4 amends) and must rely for their enforcement on other provisions of law (see analysis of S. 480 and S. 2750). Only section 4 could be enforced under 42 United States Code 1971(c) providing for actions by the Attorney General.

COMPILATION OF REGISTRATION AND VOTING STATISTICS

Section 5: Provides that the Director of the Census shall compile comprehensive information and statistics relating to the registration of voters in each State and the number of such voters who vote in elections held in such State. Such statistics shall include—

(1) Number of persons of voting age in each State classified by race, color, and national origin, who are registered to vote; and

(2) Where possible, the number of persons of each such classification who have voted in any election since January 1, 1960.

Provides that beginning with the next decennial census after enactment of the bill, the information specified shall be compiled as a part of each decennial census.

The section does not include a reference to a constitutional source but presumably the power of Congress to enact it would rest on article I, section 2, clause 3 of the Constitution which is the decennial census requirement. Extending the scope of the census to secure information for Congress necessary for legislative action has received the implied approval of the Supreme Court (*Legal Tender* cases, 12 Wall. 457, 536 (1871)).

ROBERT L. TIENKEN,
Legislative Attorney.

Senator Ervin's opening statement continued:

S. 480 was introduced during the first session of this Congress by Senator Javits, on behalf of a number of Senators.

S. 2750, the "administration bill," was introduced in this session by Senators Mansfield and Dirksen. On January 30, 1962, after some discussion on the floor of the Senate, Vice President Johnson ruled that S. 2750 should properly be referred to the Judiciary Committee. The committee, in turn, assigned S. 2750 to this subcommittee.

S. 2979 was introduced recently by Senator Keating on behalf of several Senators. The Judiciary Committee assigned the bill to this subcommittee on March 19, 1962.

These hearings begin today at the earliest possible date consonant with the preparations that had to be made for such an important study. Although the subcommittee was busily engaged with a number of constitutional problems, we were able to complete our preparations and to begin these hearings less than 2 months after S. 2750 was referred to us.

In preparing for these hearings, the subcommittee has solicited the views of the attorneys general of the 50 States and professors of constitutional law at some 150 law schools as to the desirability and constitutionality of the legislation before us. The replies, which are still being received, will be made a part of the record of these hearings.

The subcommittee also has invited the Governors of the 21 States which have some form of literacy test to testify or designate a representative to testify on these bills. Responses from the Governors indicate that representatives of several States will be heard during the course of these hearings.

The subcommittee also has invited the Attorney General of the United States, to submit his views as the Nation's chief legal officer. Mr. Kennedy has expressed his desire to come and testify on S. 2750 only, which is limited in application to Federal elections.

Also scheduled to testify are Members of Congress, representatives of various organizations, and private individuals. Others, who will not be able to appear in person, have submitted statements which will be made a part of the record.

The subcommittee has endeavored to obtain the widest possible cross section of opinion on these bills. Our approach has been, and throughout these hearings will be, one of complete impartiality and objectivity. It is anticipated that the record of these hearings will provide for the Senate a thorough source of information on all questions relevant to the bills.

The opinions of law professors and attorneys general already received by the subcommittee indicate that there is a very real question as to the constitutionality of both of these bills. During my 15 years as a judge in the courts of North Carolina, and subsequently during my tenure as a Senator, I have continued my study of the Constitution. These years of general study of the Constitution, and the time I have devoted to analyzing these bills specifically, have convinced me that S. 480 and S. 2750 are unconstitutional. My principal objection to the bills is on strict constitutional grounds and other considerations are relevant only insofar as they bear on the constitutional issues. If the Senate should feel that there is merit in these proposals, then it should proceed in accordance with the law of the land in providing for the change; and this can only be done by amending the Constitution and not by such legislation as has been introduced.

HISTORICAL

The very first article of the Constitution, which gives to the States the right and duty to prescribe the qualifications of voters, has not disappeared. It has not been repealed; and its meaning is as clear today as it was 172 years ago.

Article I, section 2, of the Constitution states very clearly that in choosing Representatives for Congress "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

According to James Madison's "Journal of the Constitution Convention," this would seem to be the provision that met with the most complete approval by the delegates. In fact, the only dissension over this clause arose when Gouverneur Morris proposed that all electors of Representatives should be required by the Constitution to be freeholders. However, the overwhelming majority of the framers felt that the right of the States to prescribe qualifications should remain unfettered. According to Oliver Ellsworth, of Connecticut, "The States are the best judges of the circumstances and temper of their own people."

The delegates were, in fact, loath to submit to the National Legislature the power to decide who might vote. George Mason of Virginia said, "a power to alter the qualifications would be a dangerous power in the hands of the [National] Legislature." James Madison himself took the floor often to defend this article which he had helped to draft. At one point, he noted that, "The right of suffrage is certainly one of the most fundamental articles of republican government, and ought not to be left to be regulated by the [National] Legislature."

On August 8, 1787, the section was approved unanimously by the Convention.

Later, during the campaign for ratification of the Constitution, article I, section 2, was defended in "The Federalist Papers." At the beginning of Federalist No. 52, the author states:

"* * * The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention, therefore to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned * * * To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision, made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established by the State itself. * * *"

Justice Story in his definitive analysis of the history of the Constitution notes the practicality of this section. "It would not be very easy for the Convention to frame any rule which would satisfy the scruples, the prejudices, or the judgments of a majority of its own members."¹

Article I, section 4, gives Congress the ultimate power to regulate the time, places, and manner of elections. However, the word "manner" as it appears in section 4 obviously relates only to the procedures of holding elections and not to the qualifications of the electors. According to Alexander Hamilton, writing in Federalist No. 60:

"The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the times, the places, the manner of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [National] Legislature."

The Supreme Court, in cases I shall discuss later, has consistently upheld Hamilton's interpretation.

However, even these assurances of Hamilton and Madison as to the limited scope of article I, section 4, did not satisfy many of the States. For example, the States of New York, Pennsylvania, and South Carolina prefaced their ratification of the Constitution with provisos and expressions of concern that Congress should not make or alter State regulations respecting the time, places, and manner of holding elections for Senators and Representatives, except when the States did not act.

North Carolina resolved: "That Congress shall not alter, modify, or interfere in the times, places, and manner of holding elections for Senators and Representatives, or either of them, except when the legislature of any State shall neglect, refuse or be disabled by invasion or rebellion to prescribe the same."

¹ "Story on the Constitution," p. 434.

Virginia, Massachusetts, and Rhode Island all passed similar resolutions on ratifying the Constitution.

According to no less authority than a former majority leader of the Senate, the late Henry Cabot Lodge, this section was only " * * * put in because toward the close of the Revolution the States failed to send delegates, in many cases, to the Continental Congress, and during the Confederation they absolutely brought the Government to a standstill by their failure to provide representation at the seat of government, and this was put in to prevent the new Government from being paralyzed in that way." This is exactly the same representation that James Madison made to the Virginia ratifying convention.

It is abundantly clear that the framers of the Constitution and the States which ratified it intended that section 4 have only the most narrow and limited application—one far too narrow to embrace the bills before us.

Article II, section 1, paragraph 2, concerning the mode of choosing electors for President and Vice President, is clear and concise: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress * * *."

There can be no doubt that the framers intended the entire process of choosing electors to remain in the hands of the States.

It is interesting to note the extent of the qualifications established by the various States at the time the Constitution was adopted, as illustrated by the following excerpt from Walter Lippmann's "The Public Philosophy."

"The inhabitants of the United States who were qualified to vote for these delegates (to the ratifying conventions) were not large in number. They included no slaves, no women, and except in New York, only such males as could pass property and other highly restrictive tests. We do not have accurate figures. But according to the census of 1790 the population was 3,929,762. Of these, 3,200,000 were free persons and the adult males among them who were entitled to vote are estimated to have been less than 500,000. Using the Massachusetts figures as a statistical example, it may be assumed that less than 160,000 actually voted for delegates to all the ratifying conventions; and of those voting, perhaps 100,000 favored the adoption of the Constitution.

"The exact figures do not matter. The point is that the voters were not—and we may add that they have never been and can never be—more than a fraction of the total population."

From the date of ratification until after the War Between the States, there was no restriction by either constitutional amendment or Supreme Court decisions upon the right of States to prescribe voter qualifications. During this time the first literacy tests appeared. In October 1855, Connecticut became the first State to adopt such a qualification, followed closely by Massachusetts on May 1, 1857.

The only two restrictions placed upon the States subsequent to the appearance of literacy tests are the 15th and 19th amendments to the Constitution. The 19th amendment, which prohibits the States or the United States from denying the right to vote on account of sex, appears to be largely irrelevant to our present study. However, from

the communications I have recently received, it would appear that some persons believe that the 15th amendment, which empowers Congress to enforce, by appropriate legislation, the right of citizens not to be denied the vote on account of race or color, would also empower Congress to pass legislation refusing to States the right to enforce an educational qualification. I cannot agree with this line of reasoning for, as the Supreme Court has said in the *Lassiter* decision, "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show."

The 15th amendment does indeed prohibit any State from using race or color as a prerequisite for qualifying to vote. However, it should be remembered that in 1870, after the House passed its version of the 15th amendment, the Senate amended it to add prohibitions against discrimination on grounds of education. But this amendment was defeated by a vote of 133 to 37 in the House, and the ultimate conference report contained the present text of the amendment. It is patently ridiculous to argue that what Congress originally and explicitly refused to provide for in the amendment is now within the contemplation of the amendment and can now be effected by legislation allegedly enforcing the amendment. In looking further for the intent of Congress and the States in adopting the 15th amendment, it is well to note here the opinions of contemporary scholars.

One authority was George W. McCrary, a member of the Iowa bar and Member of the House of Representatives who had served as chairman of the Committee on Elections. In his book, "A Treatise on the American Law of Elections," published in 1875, McCrary said:

"Subject to the limitation contained in the 15th amendment to the Constitution of the United States, the power to fix the qualifications of voters is vested in the States. Each State fixes for itself these qualifications, and the United States adopts the State law upon the subject, as the rule in Federal elections, as will be seen by reference to section 11 of article I of the Constitution" (p. 7).

* * * * *

"The right of suffrage is not a natural right, nor is it an absolute, unqualified personal right. It is a right derived in this country from constitutions and statutes. It is regulated by the States, and their power to fix the qualifications of voters is limited only by the provisions of the 15th amendment."

A former Speaker of the House and Member of the Senate, James G. Blaine in his memoirs, "Twenty Years of Congress," published in 1886, recalled that:

"The 15th amendment, now proposed, did not attempt to declare affirmatively that the Negro should be endowed with the elective franchise, but it did what was tantamount, in forbidding to the United States or to any State the power to deny or abridge the right to vote on account of race, color, or previous condition of servitude. States that should adopt an educational test or a property qualification might still exclude a vast majority of Negroes from the polls, but they would at the same time exclude all white men who could not comply with the tests that exclude the Negro. In short, suffrage by the 15th amendment was made impartial, but not necessarily universal, to male citizens above the age of 21 years."

Mr. Justice Story said of the 15th amendment:

"What is particularly noticeable in the case of this article is the care with which it confines itself to the particular object in view. The pressure of a particular evil was felt; the reproach of a great wrong was acknowledged; and that evil was to be remedied, and that wrong redressed. There was no thought at this time of correcting at once and by a single act all the inequalities and all the injustice that might exist in the suffrage laws of the several States. There was no thought or purpose of regulating by amendment, or of conferring upon Congress the authority to regulate, or to prescribe qualifications for, the privilege of the ballot. From the beginning the States had exercised that authority, and however diverse had been their action, there was no complaint of any resulting evil which in any case had become of national importance except the single one at which this article was aimed. The correction of this was consequently the immediate need, and whatever else was wrong or impolitic might properly be left to the action of the States where the subject was left when the Constitution was framed." (Vol. 2, p. 719, "Story on the Constitution" (1891).)

The import of this is clear: That Congress and the States intended the 15th amendment to mean exactly what it said. The color of a man cannot be a reason to grant or deny him the right to vote. But, all other qualifications, which have no reasonable relation to race or color, are left entirely to the wisdom of the States.

On April 8, 1913, the 17th amendment, which provides for the popular election of Senators was ratified. The first paragraph of this amendment states:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

I have searched the Congressional Record to determine if there was any attempt by Congress at the time the 17th amendment was being drafted to limit the authority of the States to prescribe the qualifications of voters for Senators. I cannot find such a suggestion, and there was no dissent to the provision giving that authority explicitly to the States. Senator Henry Cabot Lodge, Sr., correctly interpreted the above quoted paragraph of the amendment during the debate in the following words:

"After the State fixes the qualification and status of the voter, then the right to cast that vote for a United States Senator, if this amendment should be adopted and finally become a part of the Constitution, would be a right dependent upon the Constitution of the United States and guaranteed by it, and Congress would have the power to protect and assure any elector the exercise of that right. While the National Government could not in the first instance say who should vote, yet after the State should determine who its voters were, then the National Government can step in and guarantee to everyone whose status has been fixed by the State the right to exercise that franchise; and this may be done by any law which, in the wisdom of Congress, it deems sufficient to accomplish the purpose."

In the 123 years that elapsed between the adoption of the original Constitution and the adoption of the 17th amendment, no change occurred in the overwhelming intent of the people that responsibility for determining who should exercise the suffrage should remain in the hands of the States.

In the 1959 report of the Civil Rights Commission, it was recommended that the Constitution be amended to accomplish the same objective which the bills now before us seek to accomplish. Although I agree with the three dissenting members who reported that such an amendment is undesirable; nevertheless, if the great majority of citizens believe that the amendment is necessary, then an amendment would be the legal and appropriate method to secure their wish and the only constitutional method of doing so.

I do not know what precipitated the Commission's remarkable turn-about from the 1959 recommendation of a constitutional amendment to the 1961 recommendation for legislation such as S. 2750. But as we are all aware, the Constitution is the same today as it was in 1959. Those sections which give to the States the right and duty to prescribe the qualifications of voters have not disappeared. They have not been repealed; and the meanings of articles I and II and of the 17th amendment stand as firm today as the day these sections were adopted.

CASE LAW

Having discussed the historical development of the relevant portions of the Constitution, I now turn to the Supreme Court interpretation of these sections.

In this connection, I think it is sufficient to quote briefly from those Supreme Court opinions which are generally held to be the guiding cases in this area of our law. The development of the case law is evinced by the Court in construing the Federal Constitution and laws, as well as relevant provisions of constitutions and statutes of the States.

In *Minor v. Happersett*, 88 U.S. 162 (1874), the Court discussed suffrage and its relation to the 14th amendment. The opinions of Chief Justice Waite makes it clear that the proponents of this bill can find no comfort in the provisions of the 14th amendment:

"The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guarantee for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen."

Other than quoting the above case, it is not necessary to dwell on the 14th amendment. For if that amendment was meant to deal with suffrage, then the 15th amendment would be mere surplusage.

The subject of the 15th amendment, on the other hand, is clearly limited to suffrage:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

It is clear from this language that the 15th amendment is negative in character. It prohibits States from denying the right to vote to anyone on account of three enumerated possible disabilities. It is presumed that if States were precluded from establishing other qualifications, the amendment would have enumerated those, too. Further, no power was given to Congress to regulate the electoral process, except within a narrowly defined area.

According to the Supreme Court in *Reese v. U.S.*, 92 U.S. 214:

"The 15th amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. * * *

"The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude."

A very relevant case concerning the power of Congress under the 15th amendment and the power of States under article I, section 2, is *U.S. v. Miller* which declared:

"Before the adoption of the 15th amendment, it was within the power of the State to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however arbitrary or whimsical. The Constitution of the United States, before the adoption of the 15th amendment, in no wise interfered with this absolute power of the State to control the right of suffrage in accordance with its own views of expediency or propriety. It simply secured the right to vote for Members of Congress to a definite class of voters of the State, consisting of those who were eligible to vote for members of the most numerous branch of the State legislature. Further than this, no power was given by the Constitution, before the adoption of the 15th amendment, to secure the right of suffrage to anyone. The 15th amendment does not in direct terms confer the right of suffrage upon anyone. It secures to the colored man the same rights to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the States still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency * * *. 107 Fed. 913, 915 (D. Ind. 1901).

The Supreme Court adopted this same interpretation in the following language found in *Pope v. Williams*, 193 U.S. 621 (1904):

"Since the 15th amendment the whole control over suffrage and the power to regulate its exercise is still left with and retained by the several States, with the single restriction that they must not deny or abridge it on account of race, color, or previous condition of servitude."

* * * * *

After citing some of the many specific qualifications that States could and did impose, the Court continued:

"* * * the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to

be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a Member of Congress is not derived exclusively from the State law. See Federal Constitution, article I, section 2; * * *. But the elector must be one entitled to vote under the State statute * * *. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper."

Commenting for the first time on literacy tests specifically and their possible relation to the 15th amendment, the Supreme Court in *Guinn v. U.S.*, 238 U.S. 347 (1915), said:

"Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the diversion of State and National authority under the Constitution and the organization of both governments rest would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment recognizes the possession of the general power by the State, since the amendment seeks to regulate its exercise as to the particular subject with which it deals.

"* * * it is true also, that the amendment does not change, modify, or deprive the States of their full power as to suffrage except of course as to the subject with which the amendment deals and to the extent that that obedience to its command is necessary. Thus, the authority over suffrage which the States possess and the limitation which the amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both.

* * * * *

"No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision."

This language in the *Guinn* case has not been overruled. It has, in fact, been reaffirmed by a unanimous opinion handed down by the Court only 3 years ago in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959).

As I see it, from my study of the cases, the "right" referred to in the 15th amendment is not, itself, created by that amendment. The use of the word "right" in the amendment presupposes that the prospective voter is able to pass all the legitimate tests imposed upon him by the State in which he seeks to register. The actual right is derived from article I, section 1, and is only limited by prohibition against discrimination on the basis of race. Since literacy, education, and intelligence are not reasonably related to race, the bills are unconstitutional.

I could list many other cases which reinforce the proposition I have set forth. However, for the most part, the cases only repeat the holdings and precedents I have cited, and I do not want to delay these hearings by going into any greater detail than necessary.

Article I, section 4

The authors of these bills, in addition to the 14th and 15th amendments, have looked to article I, section 4 of the Constitution for authority to enact this legislation. That section, in plain words, states that "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations * * *."

As we have seen, the constitutional fathers who drafted this provision, and the States when they ratified it, never intended that the Federal power should extend to anything remotely concerned with qualification of voters.

Historically, Congress, by its own actions under this article, has indicated a belief that its powers over Federal elections can be exerted only after the qualified voter has been determined by State law. Accordingly, it has exercised some control over the mechanics of voting in order to protect the voter's actual participation in the election process, and it has legislated to prohibit fraud, violence, intimidation, illegal voting, corrupt practices, and improper political activities. Defining this power of Congress in the case of *Ex parte Yarbrough*, the Court referred to duty of the Government "to see that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its Members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

The Supreme Court has upheld congressional power to pass laws for regulating and superintending elections for Members of the House of Representatives and for securing the purity of these elections and the rights of citizens to vote in them peaceably and without molestation. *Ex parte Siebold*, 100 U.S. 371 (1879).

The majority opinion of Mr. Justice Miller in *In re Coy*, 127 U.S. 731 (1887), stated that "the power, under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a Member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned."

In considering the limits of this article, it is appropriate here to turn to the early history of the exercise of this power as described in 1915 by the Supreme Court: *U.S. v. Gradwell*, 243 U.S. 476. The Court then noted that—

"Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government, our legislative history upon the subject shows that except for about 24 years since the Government was organized, it has been its policy to leave such regulations almost entirely to the States, whose representatives Congressmen are. For more than 50 years no congressional

action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by districts, thus doing away with the practice which had prevailed in some States of electing on a single State ticket all of the Members of Congress to which the State was entitled.

"Then followed 24 years more before further action was taken on the subject when Congress provided for the time and mode of electing U.S. Senators and it was not until 4 years later, in 1870, that, for the first time, a comprehensive system for dealing with congressional elections was enacted.

"The laws provided extensive regulations for the conduct of congressional elections. They made unlawful false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election, and the neglect by any such officer of any duty required of him by State or Federal law; they provided for appointment by circuit judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such election, with authority to arrest for any breach of the peace committed in their view * * *."

The Court continued "It is a matter of general as of legal history that Congress, after 24 years of experience, returned to its former attitude toward such elections and repealed all of these laws with the exception of a few sections."

"This represented the outermost limit of Federal control over voting practices. Other legislation over elections for Federal officers has pertained to time of elections, apportionment of representation, contested national elections, procedure for the electoral college, and special district court jurisdiction—legislation, in effect related to the "time, place, and manner" of holding elections.

I think any reasonable person reading these words in conjunction with the provisions of section 2 of the same article would agree, as I do, with the opinion of Mr. Justice Field in the case of *Ex parte Clark*, 100 U.S. 404, that "regulations as to the manner of holding elections cannot extend beyond the designation of the mode in which the will of the voters will be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of the voters." These are matters, as the Justice observed, "not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the States. The only restriction upon them with respect to these matters is found in the provision that the electors of representatives in Congress shall have the qualifications required for electors of the most numerous branch of the State legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for representatives must be so framed as to leave the election of State officers free, otherwise they cannot be maintained."

Mr. Justice Miller, in a major case, upheld the power of Congress under article 1, section 4, to protect voters for national officers from

intimidation by private individuals, and held further that the right to vote for a Member of Congress is secured by the Constitution. He said in his opinion that "the States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress * * *. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members." *Ex parte Yarbrough*, 110 U.S. 651.

The U.S. Supreme Court has never been faced with the constitutionality of Federal legislation prescribing qualifications for voters in the States for Congress has never attempted to invade this reserved area of State power. However, I have no doubt that its ruling on such legislation based on article I would accord with numerous State decisions already a part of our jurisprudence. For instance, a Michigan case has held that: "The authority to direct the time and manner in which judicial officers shall be elected, and the other officers elected or appointed, does not involve the power to determine who shall constitute the electorate" (*Coffin v. Election Commissioners*, 456 NW 567), and an Oregon case decided by the State supreme court states that "time and manner does not include the power to determine what shall constitute a legal voter." 83 P. 142.

It is clear to me, that the qualifications of voters can have no reasonable relationship to the "times, places, and manner of holding elections." Article I, section 4, relates to procedures and processes. Article I, section 2, establishes a Federal-State relationship which can only be altered by amendment of the Constitution. Any attempt to alter this Federal-State relation by congressional action of lesser magnitude will, in my opinion, constitute an abridgment of the powers of the States guaranteed not only in article 1, section 2, but also by the 10th amendment.

PRESUMPTIONS

Having thus examined some of the many cases which indicate that legislation such as that before us is unconstitutional, I will now analyze some of the features of the bills.

S. 480 would apply to all elections; not simply those in which a candidate for national office is on the ballot. S. 2979 is more far reaching than either of the other two bills, for it would proscribe the States' setting any qualifications except those expressly enumerated in the bill. If enacted it would change the qualifications of voters in 45, or 90 percent, of the States. States which have chosen to do so could no longer disqualify from registering persons who, for instance, have been dishonorably discharged from the Armed Forces or who have been declared incompetent but are not under legal confinement, or who have refused to take the loyalty oath, or who have been declared paupers or vagrants. There can be no degree of unconstitutionality: if a law in any way violates the Constitution, then it is invalid. Nevertheless, the unconstitutionality of S. 2979 is undoubtedly more immediately apparent than that of S. 480 or S. 2750, for it would preempt the whole field of voter qualifications, which is constitutionally within the sole jurisdiction of the States.

Under the circumstances, I need direct my more detailed comments only to S. 2750, because it is the more narrow in its application. If S. 2750 is unconstitutional and unmeritorious, then S. 480 and S. 2979, which are even more invidious, must also be unconstitutional and unmeritorious.

In considering the desirability of any legislation, such as that now before the subcommittee, it is important to recognize the heavy responsibility that rests upon us. As the members of this subcommittee know—and as indeed every Senator knows—a great deal of our work is accomplished in committee and it is important that each committee and subcommittee do a quality of work on which the Members of the Congress can rely. Similarly, the Supreme Court has indicated time and again that in reaching its decisions, it places great reliance on legislative findings made by the Congress. Although arbitrary findings and presumptions not reasonably related to the facts cannot be used as a basis of achieving unconstitutional results, the Supreme Court has repeated that it will give great weight to the Congress findings. Thus, it is especially important that in the present legislation we evaluate most closely the findings contained therein. These findings supply whatever authorization may exist for such legislation; if these findings fall, the act must fall. Moreover, since, if these findings are made, the courts will tend to give them great credence, it is important to assure that any findings that may result will be worthy of that credence. This is part of the responsibility implicit in our tripartite form of government. In short, this concept of separation of powers assumes that each branch of the Government will perform its task conscientiously. This subcommittee proposed to discharge that responsibility in the course of its work on these bills.

Frankly, I am very disturbed about the legislative findings, especially since, in some instances, they challenged the mandate of commonsense. Moreover, they limit the sphere of action of State authorities, at a time when the States are complaining ever more vociferously that State sovereignty is being excessively restricted by Washington.

Immediately following the enacting clause of S. 2750 there are five paragraphs of legislative findings upon which the justification for the legislation obviously must rest. Through these five paragraphs, Congress would find—

“(a) That it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials;

“(b) That the right to vote in Federal elections should be maintained free from discrimination and other corrupt influence;

“(c) That many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote;

“(d) That education in the United States is such that persons who have completed six primary grades in a public school or accredited private school cannot reasonably be denied the franchise

on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship.

"(e) That large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used; that these citizens are well qualified to exercise the franchise; that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources; that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process."

The first two of these paragraphs ((a) and (b)) present no problem. They seem to be a statement of legislative policy well within the power of Congress to make and not subject to review by the Supreme Court. *Local 1976 v. NLRB*, 357 U.S. 93; *Refining Co. v. Federal Trade Commission*, 144 F. 2d 211; affm'd, 324 U.S. 726. Paragraph (a) states only that all qualified citizens should have the opportunity to vote; it does not say what the qualifications should be or who should prescribe them.

However, the findings in (c), (d), and (e) are what may be properly termed "legislative findings of fact"; the facts, in this instance, which allegedly make the legislation necessary and proper. These declarations are entitled to the highest respects by the courts, for they are presumed to be based on congressional investigations and hearings, *Griffith v. Gardner*, 196 F. 2d 698; *Kittrell v. Hutter*, 10 So. 2d 831. But the findings are reviewable by the courts, *Block v. Hirsh*, 256 U.S. 135, and the presumption of law must be reasonable, *Tot v. U.S.*, 319 U.S. 463. According to the Supreme Court in *Block v. Hirsh*, supra, at 154-155:

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that, a certain use is a public one, may not be held conclusive by the courts."

Paragraphs (c), (d), and (f) will now be reviewed in light of these facts.

The first two clauses of (c) may or may not be true insofar as they go. In other words, some evidence or, more properly, allegations exist in the Civil Rights Commission Report on Voting that literacy requirements have been used and are intended to be used to disfranchise a substantial number of Negroes in three States, Alabama, Mississippi, and Louisiana. Nevertheless, there are 66,000 Negroes registered in Alabama, 160,000 in Louisiana, and 24,000 in Mississippi. In the other four Southern States which have a literacy test, there is very little evidence of any discrimination.

In South Carolina, anyone who owns over \$300 worth of property is exempted from the test. Further, there have been no allegations of discrimination from either that State or Georgia, where it has been said that Negroes hold the balance of power in Atlanta politics. Diligent research has failed to turn up discriminatory application of the Virginia literacy requirement. In North Carolina, there have been unsubstantiated complaints from five rural counties. However, the Civil Rights Commission has failed to uncover any discriminatory

practices, intimidation, or fear of reprisal in the one county which it studied in depth. Furthermore, there are almost 12,000 Negroes registered in these counties.

Fourteen States outside of the South have literacy or performance tests, and there have been no complaints from any of them. These States have a population of 50 million. In the 3 Southern States where there is some evidence of discriminatory application of literacy tests, there is a combined population of 8½ million, which includes 250,000 registered Negro voters.

In view of these figures, it would be most difficult to maintain that the literacy tests are being used to deny any large number of people the right to vote. On the contrary, Congress would be killing the patient to cure the disease if it took away the right of a State to decide to have an intelligent electorate. All justification for such action is removed when we consider the patent untruth of the finding of the last clause in paragraph (c).

This clause states that existing statutes are insufficient to protect the right to vote. However, 42 United States Code 1971, contains provisions which not only guarantee the right to vote and prohibit others from interfering with that right, but it also gives the Attorney General the power to apply for injunctions and restraining orders in the Federal court to protect the right. It gives Federal courts the power to appoint Federal referees when a pattern of discrimination is shown. In addition, a whole Commission on Civil Rights has been established to investigate and report on discrimination. In view of the fact that much of this legislation has been enacted as recently as 1957 and 1960, it is much too early for Congress to say that it is "insufficient to protect the right to vote." Only last year the Attorney General, under the authority of the new acts, filed 14 new cases alleging discrimination in registration processes. Investigations and negotiations with local officials were being conducted in 61 other counties. The Justice Department also obtained relief for Negroes seeking to register in the only two counties in Tennessee in which discrimination has been alleged. The subcommittee has received correspondence from Assistant Attorney General Burke Marshall giving the names and dates of these cases. These letters will be made a part of the record. All indications are the existing legislation is more than sufficient to achieve the purpose of these bills.

Paragraph (d) states that education in the United States is such that persons who have completed six grades in an accredited school cannot reasonably be considered to be illiterate or to lack sufficient education or intelligence to exercise the prerogatives of citizenship. With this finding, Congress would create an irrebuttable presumption that anyone with a bare sixth grade education is capable of understanding the complex election issues which confront us today. In view of the evidence that has been accumulated concerning reading incapacity on the part of many of our adults, such a presumption, in my opinion, would be arbitrary, unreasonable, and unconstitutional.

In its decision in *Lassiter v. Northampton County Board of Education*, the Supreme Court ruled that, within the framework of our constitutional government, a literacy test is a reasonable requirement for exercise of the franchise. In short, as part of its policy, a State is entitled to require some minimum standard of education. The re-

quirement of minimum educational attainment is at least as understandable as the property qualification which was long used as a basis for the exercise of the franchise in some States. As our society becomes more complex and our problems more difficult, it is not surprising that there is an ever-increasing emphasis on education and on the need for intelligent exercise of the franchise. Presumably, no State would want to install a system such as that advocated in Plato's "Republic, where philosopher kings would dominate. But it is understandable that a State, in an effort to insure an independent and intelligent electorate, might wish to establish educational standards for its citizens as a prerequisite for voting. Finding (d) in this bill would deprive a State of its constitutionally granted power to provide such standards.

The Supreme Court has allowed a State to utilize criteria of intelligence for service on a jury. See *Hay v. New York*, 332 U.S. 2d (1947). The States frequently apply educational qualifications in determining eligibility for the practice of many professions and trades. For instance, lawyers are generally subjected to educational tests as a prerequisite for practice; and in most States, graduation from accredited law school does not exempt one from that requirement. Doctors, nurses, dentists, and many others also are subjected to tests as prerequisites for practice even though they have graduated from accredited professional schools.

With respect to the significance of the completion of six primary grades in a public school or accredited private school, I think it is impossible to be dogmatic. There are some schools where students would not have completed these grades without reaching some level of intellectual attainment. There are other schools where this might not be true, and where the teachers are more concerned with adjustment than attainment and try to have each student advance at the same rate as those of the same age.

Many of our modern schools have as many as four levels in each grade. Other school systems have adopted a policy of promoting students automatically in the early grades. Still others have a policy of promoting a child during the primary grades when he has spent a maximum of 2 years in one grade. I would not seek to choose between different theories of promotion of students; I simply note that such differences exist. Indeed, it has been reported that in some instances schools have become "blackboard jungles," where the primary function of the school is semicustodial. In view of the lack of uniformity on a national scale, finding (d) of this bill is fiction, rather than fact. In fact, to create a conclusive presumption that all persons who have completed six grades only because they have attended school for 6 or 8 years, can qualify as literate is patently untenable. Our fine accredited schools for mentally retarded children are doing a wonderful job in preparing their pupils for later life. Nevertheless, the unfortunate truth is that many of the mentally retarded may never be able to assume the burdens of citizenship. Earlier this session, the President sent to the Congress a proposal for the advancement of adult literacy in the United States. In connection with this proposal, the Secretary of Health, Education, and Welfare stated in a letter to Vice President Johnson that 20 million Americans over age 25 cannot adequately read an English language newspaper. Only 8 million of

these have completed less than 5 years of school. It is most unlikely that the other 12 million dropped out of school before they finished the sixth grade, according to the Secretary's statistics. Therefore, there are obviously large numbers of Americans who have finished the sixth grade and are unable even to read a newspaper.

It appears that the original basis for the presumption of paragraph (d) is a report of the Census Bureau. The Bureau found that the sixth grade level was the point at which most people are able to read and write. This is the arbitrary cutoff point, and it is only a working hypothesis that a person is suddenly literate in the sixth grade rather than the fifth or seventh. This presumption may be valid for the Census Bureau, but as the basis for legislation, it is unconstitutional. In *Schechter v. U.S.*, 295 U.S. 495 (1935), an arbitrary finding was held insufficient to sustain the National Industrial Recovery Act. The Supreme Court in that case, said:

"While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws * * *."

The finding in the *Schechter* case was, that at the date of enactment (June 1933), "A national emergency of widespread unemployment and disorganization of industry * * *" existed. The findings which are proposed in these bills appear to me more arbitrary and unreasonable than was a finding to the effect that unemployment and disorganization of industry existed at the height of the depression.

In his message to the Congress on February 6, 1962, regarding the adult literacy program, the President noted that a million people a year leave school before completing high school, which most educators consider the bare minimum to meet the problems of modern day life. Are those people who drop out between the 6th and 12th grades any better prepared to make those most important of all decisions, the decisions at the polls?

It is not my position that junior high school, high school, or college diplomas should be prerequisites for one who would register to vote. However, I feel that a particular State, after looking at its own situation and problems, might reasonably and not arbitrarily conclude that a stricter requirement than a sixth-grade education is desirable. This bill would take from that State the right to make such a determination. It is appropriate here, I think to turn again to the language of the Court in the *Schechter* case. In speaking of legislation which would take from States their right to regulate intrastate commerce the Supreme Court said:

"The Government also makes the point that efforts to enact State legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for Federal legislation on the subject of wages and hours. The apparent implication is that the Federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it."

Nor does the Federal Constitution provide for a substitution by Congress of its own arbitrary opinion for that of the States, with regard to what should be a sufficient educational qualification for voting.

Paragraph (e) states that :

"(e) Congress further finds that large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used; that these citizens are well qualified to exercise the franchise; that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources; that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process."

I seriously doubt that these findings can be substantiated, and I am also troubled by their implications. In some countries several languages may be equally recognized. For example, in Switzerland there are four official languages, and in India, two, and, of course, there are other examples of nations with more than one official language. But in such countries there are ethnic, geographical and historical factors which do not exist in the United States. In this country, English is the recognized language. The Constitution, the Declaration of Independence, and all other documents have been written in English. The official language did not change with the purchase of the Louisiana Territory or when Florida was added to the Union. Throughout our history we have acquired territories without accepting their indigenous languages.

Indeed, as part of the melting pot philosophy, there has been active encouragement to learn English. I have heard of instances where young children of immigrant parents tried to forget the foreign language they had learned in their homes in order to establish all the more affirmatively their identity as Americans. In short, the existence of a single recognized language is a sort of unifying force; in those States which require a knowledge of English as a prerequisite for exercise of the franchise, there is considerable incentive to learn English as a means of being assimilated into the American melting pot. President Grant noted this when he said :

"Foreigners coming to this country to become citizens, who are educated in their own language, should acquire the requisite knowledge of ours during the necessary residence to obtain naturalization. If they did not take interest enough in our language to acquire sufficient knowledge of it to enable them to study the institutions and laws of the country intelligently, I would not confer upon them the right to make such laws nor to select those who do."

Whether everyone agrees with the exercise of this sort of pressure to learn English, it occurs to me that this is a matter as to which States might reasonably differ in policy; and that the Congress should not seek to eliminate this possibility of difference.

I have no quarrel with Spanish. I think it is a beautiful language; but I suggest that a State should not be precluded by a fictitious congressional finding of fact, from requiring knowledge of English as a basis for participating in the democratic process.

It is not, in my view, unreasonable for a State to require at least some rudimentary grasp of English by its electorate, and since a reasonable basis *does* exist for such a qualification, then I believe that it would be unconstitutional for Congress to prohibit the States from setting such a requirement. And, I might add that access to English classes is not so difficult that such a requirement is a permanent barrier to the franchise. Instead, I view it as an incentive to master English and to become more fully identified with the United States.

However, even assuming that there is a sufficient Spanish language news media available in certain areas to provide for an informed Spanish-American electorate, there would then be no justification for excluding other foreign language-ethnic groups from the provisions of this paragraph. There are enough divisive forces in America today without our officially recognizing particular languages to the exclusion of others. Furthermore, there is no legal basis for not including, for example, the Yiddish speaking people of New York or the Polish-Americans in Chicago or the Chinese-Americans in San Francisco. This bill would seem to invite the various linguistic groups to litigate the adequacy of their newspapers in order to establish the right to vote.

Paragraph (e) clearly denies to others similarly situated due process of law under the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497. In other words, it denies to citizens of the United States who speak foreign languages and who do not speak English, the same right to vote that the bill grants to citizens who speak Spanish. If a State passed such a law discriminating in favor of one foreign language group to the exclusion of others, it would clearly be a violation of equal protection of the laws guaranteed in the 14th amendment. Since equal protection is implicit in fifth amendment due process, according to *Hurd v. Hodge*, the finding of fact in paragraph (e) is unconstitutional.

Title 8, United States Code 1423, provides that an alien must demonstrate that he can read, write, speak and understand the English language before he can be naturalized. Is it unreasonable to demand the same one who would register to vote? The Federal Government has found these requirements to have merit, and, to my knowledge, no one has proposed that these qualifications be abolished. If Congress, after careful consideration and deliberation, has found these standards desirable for conferring citizenship, are the States being unreasonable when they make similar demands of their electorates? I think not.

However, if this provision remains in the bill, then, in order to be consistent, it is essential that the bill be amended to require that ballots be printed in the Spanish, as well as in the English language. Once such a precedent is established we can expect demands for its extension, and, carried to its logical conclusion, all official Government publications and documents should be required to be printed in Spanish as well as English.

S. 2750, with regard to its proposed finding of fact, is very similar to the old National Industrial Recovery Act. Both pieces of legislation would attempt to invade an area specifically reserved to the States by the Constitution. Both pieces of legislation would attempt to justify the unauthorized invasion by asserting certain so-called legislative findings which close examination shows are unwarranted expres-

sions of congressional opinion. The Supreme Court declared the National Industrial Recovery Act to be unconstitutional and I maintain that the provisions of S. 2750 are likewise unconstitutional.

It is my considered opinion that these bills are based upon fallacious presumptions; they are undesirable, unnecessary, and unconstitutional.

Senator ERVIN. I would now like to say a few words with reference to the attempts in these bills to legislate truth of facts.

I respectfully submit that the purposes of these alleged findings of fact, which are set out in the preambles and the whereases of each of these bills, represent an effort on the part of Congress to usurp the judicial power vested in the Federal courts.

It has been held in many cases that a legislative body cannot legislate the truth of facts, and that an effort to do so interferes with the exercise of the indestructible judicial power, and for that reason violates the clauses of the Constitution guaranteeing that no person shall be deprived of life, liberty, or property without due process of law under the law of the land.

I would like to repeat what I said on the floor of the Senate on Friday of last week. The allegation made in support of the enactment of these bills, that the National Government does not now have enough laws upon the statute books to secure to every qualified voter in any precinct, anywhere in the United States, the right to vote, is totally without foundation.

Under an act of Congress, any citizen of the United States who is qualified to vote has two personal remedies for any deprivation or threatened deprivation of that right. He has a right to sue the election official who denies him the right for damages. Furthermore, he has a right to bring a suit in equity, triable in the Federal courts, to prevent his being deprived of such right.

Therefore, there are two remedies available to the individual who suffers deprivation of his right to vote, or who is threatened with deprivation of his right to vote.

In addition to that, there are two statutes upon the Federal statute books, one of which makes it a crime, punishable by imprisonment and fine, for any election official, in any precinct, anywhere in the United States, willfully to deny to any qualified voter his right to register and vote.

In addition to that, you have another Federal statute making it a criminal offense punishable by a fine of as much as \$5,000 and 10 years in prison for any election official to conspire with another person or persons to deny any qualified voter the right to register and vote in any precinct anywhere in the United States.

There is not a situation existing anywhere in the United States in the voting field that could not be removed—that is any improper situation—that could not be removed by a few, old-fashioned criminal prosecution in the Federal courts. And these statutes—these two criminal statutes are available to the use of the Department of Justice, which has a full-time U.S. attorney in every Federal judicial district in this country, and has also in each Federal judicial district a number of full-time assistant U.S. attorneys who are charged with the duty of prosecuting violations of the criminal laws of the United States.

In addition to that, the Federal Government has FBI agents scat-

tered throughout the United States to make investigations into matters of this kind.

So it is absurd to assert that the Federal Government does not have sufficient power in this field, when it has power under which it can send people who act wrongfully in this area to prison.

In addition to that, in 1957 the Congress passed the Civil Rights Act of 1957, which authorizes the Attorney General of the United States to bring a suit in the name of the United States, and at the expense of the taxpayers of the United States, in behalf of any qualified American citizen who is wrongfully denied his right to register and vote or who is threatened with a wrongful denial of his right to register and vote.

Under this statute the cases can be tried in the Federal district court, without a jury, and the Federal district judge is the judge of the facts as well as the law.

As I demonstrated on the floor of the Senate the other day, a Federal district judge, under the North Carolina literacy test, could easily determine in less than 43 seconds whether a man meets a literacy test and has been wrongfully denied his right to register and vote on that basis.

So it is a manifest absurdity to say that under those circumstances you haven't got a sufficient civil remedy in the hands of the Department of Justice.

Furthermore, in 1960, the Congress passed an amendment to the Civil Rights Act of 1957 which provides that where qualified persons are denied the right to register and vote, because of their race, and such denial is pursuant to a pattern of discrimination, that the Federal district court, in a case which it has tried without a jury, can appoint a referee to pass upon the qualifications of such person.

You know, sometimes a story illustrates a point better than an argument of the point.

Having two criminal statutes in this field and the Civil Rights Act of 1957, and the amendment to the Civil Rights Act of 1960, there is just no basis whatever for arguing that you need this statute.

I told a story on the floor of the Senate that I think illustrates the point I am trying to make.

There is a fellow named John escorting a girl named Mary. One night they were sitting on the bench in the moonlight, and the odor of flowers permeated the atmosphere. It was a time and a circumstance which would inevitably engender romance in the heart of anybody. And John said to Mary, "Mary, if you wasn't what you is, what would you like to be?" And Mary said "John, if I wasn't what I is, I would like to be an American Beauty rose." Then Mary turned the question on John, and said, "John, if you wasn't what you is, what would you like to be?" John said "If I wasn't what I is, I would like to be an octopus." Mary said "John, what is an octopus?" John says "An octopus is some kind of a fish or an animal or something that has a thousand arms." Mary said "John, if you was a octopus and had a thousand arms what would you do with all those arms?" John said, "I would put every one of them around you." Mary said "Go away, John, you ain't using the two you have already got."

If there is any failure anywhere in the United States of a person to secure his legal right to register and vote, there are plenty of

statutes on the books to enable either that individual or the Department of Justice to secure to him that right. And if they are not getting it, it is because they are not using their arms, for the statutes they already have.

I thank everyone who has been patient.

Do you have a statement?

Senator HRUSKA. Not at this time, Mr. Chairman, thank you very much.

Senator ERVIN. Senator Johnston has a statement.

STATEMENT OF SENATOR OLIN D. JOHNSTON

Senator JOHNSTON. Mr. Chairman, the proposed legislation now pending before the Judiciary Subcommittee on Constitutional Rights is the latest attack launched against the control of elections by the individual States.

It is another determined effort by the band of liberals to place under the Federal Government complete control of all elections. The proponents of this bill would have the Federal Government force the States to permit every individual to vote regardless of their ability to read, write, and comprehend the candidates and the issues of the day.

In each passing year we see more and more attempts to destroy the foundation of our election system by those who would unconstitutionally legislate away the powers of the individual States. It is my purpose today in addressing the subcommittee on this subject, to place in the record the unquestionable, documented legal and historical background why the Congress cannot constitutionally legislate away from the States the right to control their own elections. The establishment of reasonable and responsible prerequisites to voting is a State right and a State function. This proposed legislation which would attempt to impose upon the States a uniform literacy test requirement for voting in Federal elections in all the States, is unquestionably unconstitutional.

This bill itself can be said to be comprised of two parts. The first is a preamble that states it to be the finding of Congress that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote, denials which may or may not be based on race or color, and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote. There is no proof of this, and from a legal standpoint these tests requirements in the several States from their language apply to all citizens alike without regard to race or color and have, therefore, been upheld by the U.S. Supreme Court which in numerous cases has said they are valid so long as they do not discriminate and apply to all alike. These literacy tests statutes have been upheld by the Supreme Court without exception and as late as 1959, with respect to North Carolina in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45.

The second part of this bill is the operative section which amends section 131(c) (b) of the Civil Rights Act of 1957 (42 U.S.C. 1971 (b)). This provision would add another prohibition in a Federal election against subjecting or attempting to subject any person to the

deprivation of the right to vote in any Federal election. "Deprivation of the right to vote" is defined as to—

include but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated; and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

The bill states that the basis of congressional authority for the enactment of such a measure are set forth as the 14th and 15th amendments, article I, section 4 of the Constitution. I shall rely on these provisions of the Constitution to show that this bill is unconstitutional and the Supreme Court cases affirming my position.

A Federal statute attempting to establish a uniform literacy requirement for voting in Federal elections certainly is unconstitutional. The creation of such a qualification for voting would require an amendment to the Constitution of the United States. Of course we realize that the Constitution provides the method by which the Constitution itself may be amended and the only way in which it may be amended, and certainly Congress has no right by an act to amend the Constitution. The power was left to the States to determine the qualification of its voters.

Concerning the qualification of voters for U.S. Senators and Representatives in Congress the Constitution contains the following provisions. I first quote from article I, section 2, clause 1:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

I now quote from the 17th amendment with reference to election of Senators and I do so because there are some that have maintained that this in some way took away the exclusive rights of the States to set the qualifications of the voters. It does not because the language is simple and clear. Reading from the 17th amendment:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of its State legislature.

This is certainly clear language. Certainly we do not deny the right of the States to name the qualifications necessary for the electors of its own State legislature. It is evident from the above provisions that although the States may not prescribe the qualifications of votes of Congress as such, the qualifications prescribed by the States for electors of the most numerous branch of their legislatures are adopted by the Constitution for this purpose.

I would like to point out here that most States, according to these provisions of the Constitution, have adopted a literacy test of their own, the State of New York included. The State of New York has a strict literacy test. No mention has ever been made that they did not have the right to set such qualifications so long as they did not discriminate. It is certainly evident from the provisions which I have quoted that although the States may not prescribe the qualifications

of voters of Congress as such, the qualifications prescribed by the States for electors of the most numerous branch of their legislatures are adopted by the Constitution for this purpose. Certainly I say again that no one argues that any authority other than the States themselves have the right to set the qualifications for electors of the most numerous branch of their legislatures.

I want to discuss the last point which I have made, the Supreme Court opinion in *Ex parte Yarbrough*; reported in 110 U.S. 651, 663, stated as follows:

The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress. It is not true, therefore, that electors for Members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

However, it clearly leaves it to the States, and this is part of the above case cited, *Ex parte Yarbrough, supra*.

Now quoting from the 14th amendment, section 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basic representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

So we see that this section does not take away or in any way deny the right of each State to set the qualifications of voters but still leaves it in their exclusive jurisdiction to provide the qualifications of voters and provides some penalty for discrimination but in no way takes away the right of States to set qualifications.

As early as 1898 the U.S. Supreme Court held that the provision of section 244 of the constitution of Mississippi, making the ability to read any section of the Constitution, or to understand it when read, a necessary qualification to a legal voter, does not on its face discriminate between the white and Negro races, does not amount to a denial of the equal protection of the law secured by the 14th amendment of the Constitution. The constitution of Mississippi and its statutes "do not on their face discriminate between the races and it has not been shown that their actual administration was evil, only that evil was possible under them," and this is the language of the Supreme Court in the case of *Williams v. Mississippi* reported in 170 U.S. 213, 220, and 225.

I quote now from the 15th amendment, because again some have maintained that this might have changed or abridged the right of States to the exclusive jurisdiction to name the qualifications of the

voters. The 15th amendment reads as follows, reading from section 1 thereof:

The right of citizens of the United States to vote shall not be denied by the United States or by any State on account of race, color, or previous condition of servitude.

It says nothing, of course, about the States not having the right to set their own qualifications for their voters and does not take away that right by this provision but only provides that there shall be no discrimination, and, of course, if the literacy test provided by the States are the same for all of their voters as stated and are fair, then certainly the States have this right and there is no discrimination. Repeating again the case of *Williams v. Mississippi*, supra, as quoted above, upholding constitutional provisions of the Mississippi statute relative to the literacy test, the Court clearly said that since the States have the right under the Constitution to name the qualifications, they have the right to make a literacy test a necessary qualification, the only limitation being that it shall apply to all voters alike, and is valid so long as it does not discriminate.

I quote now from section 2 of the 15th amendment:

The Congress shall have power to enforce this article by appropriate legislation.

The effect of this amendment is beyond any doubt that the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rest would be without support and both the authority of the Nation and the State would fall to the ground.

In fact, the very command of the amendment recognizes the possession of the general power by the State, since the amendment seeks to regulate its exercise as to the particular subject with which it deals; that is, that there shall be no discrimination among the races and that is all that it seeks to do. It does not in any sense take away the right of suffrage or right of qualifications to be set by the States themselves.

No time need be spent on the question of the validity of the literacy test considered along since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.

This last was quoted from *Guinn v. United States*, 238 U.S. 347, 362, 366.

The decision in *Guinn v. United States*, supra, may be summarized by saying that it held that the power was left with the States to determine the qualifications of their voters and a State may establish a literacy test as a prerequisite for voting provided that such test applies alike to all citizens of the State without discrimination as to race, creed, or color.

And going back, as stated, above, practically all the States have followed this, including States in the North and South, among them the State of New York, as stated above, providing literacy tests. There has never been any contention that a literacy test was not valid as long as it did not discriminate. Certainly the amendments and the court decisions only hold that there shall be no discrimination.

None of these provisions take away any of the rights of the States that they have and have always had to determine the qualifications of the voters by the States themselves.

Now quoting the Supreme Court on the 14th and 17th amendments:

The principle laid down in *Guinn v. United States*, *supra* and *Lassiter v. Northampton Election Board*, 360 U.S., pages 45 and 50, as follows (and I might point out that this case is as recent as 1959) the Court said as follows:

"We come then to the question whether a State may consistently with the 14th and 17th amendments apply a literacy test to all voters irrespective of race or color." The Court in *Guinn v. United States*, *supra*, on page 360, disposed of the question in a few words, "No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted."

Continuing quoting from the Court:

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.

Cited in support of this is the case of *Pope v. Williams*, reported in 193 U.S. on pages 621, 633; *Mason v. Missouri*, reported in 179 U.S. on pages 328, 335:

Absent of course the discrimination which the Constitution condemns. Article I, section 2 of the Constitution in its provision for the election of Members in the House of Representatives and the 17th amendment in its provision of Senators provide that officials will be chosen "by the people." Each provision goes on to state that "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the legislature."

Again I say that certainly no one denies the right of the States to name the qualifications of the members of their legislature. And this quoting from the Supreme Court stating again that in interpreting the above-named sections of the Constitution that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Quoting further from the Supreme Court:

So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarborough*, 110 U.S. 651, 663-665; *Smith v. Albright*, 321 U.S. 649, 661-662) it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

This is quoting still from the Supreme Court in which it says (*United States v. Classic*, 313 U.S. 299, 315) that the only power that Congress has is to pass legislation to see that these qualifications are not discriminatory, and as long as they are not the State has the right to state the qualifications of its voters applying the same to all of its citizens, this latter being the only restriction.

Further quoting from the Court in this case:

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet

in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.

This is also from the Supreme Court. We say, of course, again that certainly States have the right to provide the qualifications according to residents' age, etc., and as the Court has said, it also has the right to state the literacy requirements according to its standards for all voters within the State and Congress under the Constitution and these decisions of the Court certainly have no right constitutionally to take away that right from the States or to say that the States would not have the right themselves to state what these literacy qualifications should be in each State.

Continuing quoting from the Court :

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. (Citing *Davis v. Schnell*, quoted in 336 U.S. 933.)

Further quoting :

* * * the great discretion it [the legislation] vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter "be able to read and write any section of the constitution of North Carolina in the English language." That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen.

I maintain again that the 15th amendment provides only that there will be no discrimination as to race, creed, or color, etc. It in no way touched on the question of the right of the States to name the qualifications for its voters as long as there was no discrimination and so by this constitutional amendment the right of the States to name the qualifications of its voters remains with the State alone.

We may summarize *Lassiter v. Northampton County Board of Elections*, supra, to affirm the principle that the application of a literacy test by a State as a qualification for voting is consistent with State power under the 14th and 17th amendments if applied to all voters alike, irrespective of race or color; and if such requirement is not unfair on its face and does not show an intent to effectuate discrimination, it is not violative of the 15th amendment.

ARTICLE I, SECTION 4, CLAUSE 1

We have seen from the aforementioned decisions that a State statute providing literacy as a qualification for voting in a Federal election is not only valid but actually derives its validity from article I, section 2, clause 1, supra, and from the 17th amendment, supra, the provisions of which give recognition to the fact that the States may set requisites for electors of the most numerous branch of the State legislature by adoption of these requisites for electors of U.S. Senators and Representatives.

We come now to the effect which article I, section 4, clause 1 of the Constitution may have upon the question.

The Constitution provides in clause 1 of section 4, of article I as follows:

The times, places and "manner of holding" elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The case of *Ex parte Clarke*, 100 U.S. 399, decided in 1879, involved the constitutional power of Congress to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a Representative to Congress. The Court held that Congress did have this power. This type of statute was considered as covering the "manner of holding" an election.

The case did not involve the qualification of voters. However, Justice Field, in the dissenting opinion, does speak about qualifications of voters and makes the following comment on pages 418-419:

Quoting Justice Fields:

* * * The power vested in Congress is to alter the regulations prescribed by the legislatures of the States, or to make new ones, as to the times, places and manner of holding the elections. Those which relate to the times and places will seldom require any affirmative action beyond their designation. And regulations as to the manner of holding them cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of voters. These are matters not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the States. The only restriction upon them with respect to these matters is found in the provision that the electors of Representatives in Congress shall have the qualifications required for electors of the most numerous branch of the State legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for Representatives must be so framed as to leave the election of State officers free, otherwise they cannot be maintained. In one of the numbers of the *Federalist*, Alexander Hamilton, in defending the adoption of this clause in the Constitution, used this language: "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle in this case would have required no comment." By the act of Congress sustained by the Court, an interference with State elections is authorized almost as destructive of their control by the States as the direct regulation which he thought no man would hesitate to condemn.

The views expressed derive further support from the fact that the constitutional provision applies equally to the election of Senators, except as to the place of choosing them, as it does to the election of Representatives * * *.

It is apparent from Justice Field's comments, that this provision of article I, giving Congress the power to alter such regulations of the times and "manner of holding elections for Senators and Representatives" does not apply to qualifications for voting.

It would seem that if the Constitutional Convention had intended section 4 of article I to authorize Federal legislation concerning qualification of voters, then such intent must have been to nullify, by section 4, the power over qualifications of voters which it had just left with the States in section 2 of the same article I. It is difficult to attribute such

a motive to that body. Thus, since it is a "most fundamental principle of our constitutional jurisprudence" that "all the provisions of the Constitution are equally binding upon Congress" (and I quote there from Willoughby on the Constitution of the United States, vol. 1, p. 493), it must be assumed that section 4 of article I means no more than what it says and applies only to the manner of holding elections, leaving the coverage of the qualification of electors to section 2 of said article, which leaves it to the exclusive jurisdiction of the States and to the States only and not to Congress.

Under what authority, then, can Congress enact legislation concerning such qualifications? The answer is clear that Congress has no such power and to acquire it would require a constitutional amendment, which under the Constitution there is only one way as stated above that the Constitution can be amended. And it certainly cannot be amended by act of Congress of the United States which is attempted in the present bill before the committee today.

In further discussing the unconstitutionality and illegality of the attempt in this measure before the committee by such legislation to usurp the constitutional rights of the State, in making my following remarks I shall make some reference to an editorial which appeared in the Wall Street Journal January 30, 1962, and which later appeared in the Congressional Record in its entirety. The editor says that now he possesses an official certificate (his voting certificate) from the State of New York testifying that he can read, and he goes on to state that New York requires every voter to be able to read the English language and strangers within its gates are required to show proof by taking a literacy test by the New York Legislature according to the needs of the people of the State of New York. Now, though, we are being told by a number of political leaders that it is a wicked thing to make a literacy test for voting. This, of course, is another fact in the latest in a series of moves, all put forward in the name of "civil rights," to challenge any and all requirements for voting which the Constitution allows the several States to establish, among them a literacy test. And, of course, the immediate cause of this latest attack on literacy requirements is the unhappy fact that among some minority groups there is widespread illiteracy. Many Puerto Ricans cannot speak it, much less read it. And as any Army recruiting officer can tell you, there are many people who can't read their native tongue well enough to understand the simplest instructions. The politicians' immediate interest is that all these add up to many potential voters who would be grateful to the politician who won them the voting privilege, regardless of whether the voter understood for whom he was voting or what he was voting for, or why. So, therefore, we contend that these, certainly the lawyers, know that it would be unconstitutional to deprive the States of their right to set the qualifications of voters of the States, and accordingly each State must determine the test needed for that particular State, just as it must for age, residence, and other requirements.

According to all the decisions of the Supreme Court of the United States which I have quoted, these literacy tests have been upheld numerous times by the Supreme Court as a valid requisite for voting. Each State must set its own standards and qualifications for voting, but it must be sure that those who vote can intelligently vote and can

cast their own ballot. Certainly there is no charge here that any of these are discriminatory. But it seems to us here that this is the way by such type of legislation as this proposed bill would provide a means for voting and controlling bloc votes of ignorant ones whose true wishes would be denied. And those people voting would not know how they were voting, for whom they were voting or why. Certain politicians said they could control bloc votes in this manner. The thing, from a legal standpoint, that is being assaulted in this proposed measure before the committee today is the fact that responsible democracy rests upon responsible voters; the child, the moron, the illiterate, the ignorant, the man who contributes nothing to the commonwealth, the voice of each of these should be counted equally with the voice of the literate, the educated, the intelligent, and the informed, according to these politicians. Certainly that would not make for good government. It would mean that there would be those politicians who could control these ballots; therefore, our forefathers placed in the Constitution the rights of the States to name their own qualifications. The Supreme Court has wisely seen fit in all its cases to uphold the validity of all the literacy tests for each State so long as they did not discriminate according to race, creed or religion.

It certainly gives the States the right to say that those who vote within the borders of the State shall be able to vote intelligently. By the same token it says plainly that none of those who propose such legislation would attack the fact that each State has the right to state what age a person must be before he is qualified. Following their argument here, why should they not be able to pass a bill which would apply to all States saying that children 10 years of age could vote? It would make certainly as much sense as this type of legislation. And perhaps children 10 years of age, many of them at least could vote more intelligently than those who are illiterate, who cannot understand the English language as it is written and who, therefore, in their voting would not make for good government.

As I say again, constitutionally these qualifications are left to the States, the Supreme Court has upheld the validity of each State in these literacy tests so long as they do not discriminate. Now, society, certainly in this view, must be permitted to protect itself with even the most rudimentary rules to make voting a privilege of those who have at least an elemental understanding of, and make some contribution to, the society in which they are privileged to live. As I say again, some of these references are to the editorial as aforementioned.

It would be fruitless to remind those of this persuasion that the American experiment owes its success to the wisdom of those who, in drawing its basic Constitution, knew the dependence of democracy upon a responsible citizenry and wrote in many more voting restrictions than we today would dream of. The reminder would not be persuasive because, among those people, traditional wisdom is hooted at.

They all want the ignorant to vote. They might as well say that the children shall vote, that anyone can vote; therefore, if there are restrictions placed on voting, these literacy tests I say again have been upheld by the Supreme Court on all occasions.

Another requisite for voting which is guaranteed the States by the Constitution is the requirement of residence for a certain length of

time. This is not being attacked, yet. However, I am sure that if the forces behind this proposed bill are successful in this endeavor, they will be knocking at the Senate door to do away with residency and other State-imposed prerequisites to voting. Indeed, they will probably want to clear the decks of all prerequisites to voting and allow anyone to vote regardless of how unqualified they are to judge the issues and regardless of how unable they are to reason right from wrong. The reason for the residence requirement is the reason that even if a person is literate and well educated that certainly he is not in a position to cast a ballot in a locality unless he has been there a sufficient time to understand the issues. Then why would it be proper not to have the States establish adequate literacy tests to be sure that those who vote know for whom they are voting and why they are voting. That again, I say, is why the Constitution guarantees the right of the States to set the qualifications, among them age, residence, and literacy, which have all been upheld by the Supreme Court. And as the editor in the *Wall Street Journal* said, to cast a ballot is a proud thing, and as a nation we ought to work hard to make the best government possible for all. But the way to do it is to lift up the underprivileged and not to heed those who would debase the privilege.

For the reason that the Constitution guarantees that each State deciding according to its own needs legislates the necessary age, residence requirements and necessary prohibitions for those who have been convicted of certain crimes, it must then necessarily follow that each State according to its own needs is guaranteed under the Constitution and must set its literacy requirements, so long as it applies to all citizens of the State alike. The proponents of this bill do not contend there is any distinction between the rights of States to provide age and residence requirements, nor do they contend that Congress could pass a uniform age and residence voting bill. What is the difference?

Also, we know that it is elementary that any rights not reserved to the Federal Government are left to the States. In this instance we go further because voting qualifications for States are guaranteed to the States by the Constitution; and, therefore, the rights can only be taken away from the States by constitutional amendment and not by act of Congress as is proposed here today.

The argument that the term "manner" is a source of authority for the provision in the bill is thus found to be without substance. There is a clear distinction in the Constitution as between power to regulate the manner of holding Federal elections and regulation of the qualifications requisite for voting at such elections. The one authority is found in article I, section 4, clause 1, and is separately allocated from article I, section 2, clause 1, and from the 17th amendment. "Manner" refers to the mode of voting. The method by which eligible or qualified voters' choices are expressed and determined.

The difference between the power to regulate the "manner" of Federal elections and the qualifications of voters thereat is as wide as the difference between determining "how" and "who." By no stretch of the imagination can the "how" of voting be deemed to encompass the "who."

All of the Supreme Court opinions which the Court interfered in elections dealt with fraud, corruption, and preventing someone qualified from voting. In fact, the most extreme definition of the scope

of the power to regulate the manner of holding Federal elections, that pronounced in *Ex parte Siebold* in 1880 did not include extension of the authority over voters' qualifications. The Court (p. 396) in discussing the scope of power that Congress might exercise if it were, under article I, section 4, to assume the entire control and regulation of the election of Representatives, stated :

This would necessarily involve the appointment of places for holding the polls, the times of voting, and the officials for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the results, etc.

I have cited several cases in which the Court interfered with reference to the "manner" of holding elections. I have cited numerous cases, including one as recent as 1959, showing that the Court has always upheld the right of the States to determine voter qualifications, and in both lines of cases, those on the "manner" and those dealing with qualifications, the Court has always distinguished between the "manner" of holding elections and the qualifications of voters and has said in all of these decisions that while the manner of holding elections may be determined by an arm of the Federal Government, that the qualifications of the voters, according to the Constitution, rest solely and exclusively with the States.

The strength of our system is rooted in a balanced, divided, and limited government, and thus far the States, according to the Constitution of the United States and sanctioned by the Supreme Court, have exercised their power to determine voter qualifications on a non-discriminatory basis, in accordance with the wishes of their own citizens, not as directed from Washington. These qualifications have served for electors of Representatives and Senators as well.

This method of prescribing qualifications was an essential element of our original conception of a balanced, divided, and limited government. The same principles guide us today. But if the balance of the system is weakened, the division erased, and the limitation (provided for in the Constitution) on the National Government removed, the necessity of reliance on persuasion and compromise is also minimized and can easily be replaced by reliance on other agents such as force.

Proponents of this bill say that action by means of a statute is all that is necessary to achieve what is really general regulation over voter qualifications. Yet, most of these same Senators in 1960 voted to approve a constitutional amendment prohibiting the imposition of a poll tax as a condition for voting in Federal elections. A poll tax determines eligibility to vote. It is a voter qualification factor just like a literacy test. How is it then true that those who now assert that voter qualifications can be regulated by Congress by statute were of the opinion 2 years ago that the proper vehicle for this was a constitutional amendment? Because of the clear constitutional question presented the only proper course then to follow is the procedure of constitutional amendment in establishing uniform literacy requirements for Federal elections. While I must admit it would be legal to establish a so-called uniform Federal literacy requirement for voting by enacting a constitutional amendment to this effect, I say it not only would be wrong, but it would be clearly contradictory to the original understanding reached by the various States when they adopted the Constitution.

It should be remembered that many States hesitated some time before they ratified the Constitution. The reason was because they felt the Constitution did not guarantee strongly enough these rights to the States and did not guarantee enough rights to the individual States. We should not now justify this hesitancy by destroying what was guaranteed in the Constitution.

As I have pointed out, the very men who wrote the Constitution and who urged the confederation of the various States, insisted that the individual States retain the right to establish voting prerequisites and insisted too that the Federal Government be excluded from these rights by the Constitution. Therefore, any attempt to take away this right from the States either by constitutional amendment or by this legislative ravishing process would not be extending any freedom to any citizen of our land, but to the contrary would be giving another control over our people by distant, cold Federal regulation.

Another foundation block of our republic will have been removed and the erosive process conducive to the destruction of our democracy will be stimulated. I earnestly request that each member of this subcommittee think hard and long on this matter before they decide this issue. I ask them to read and study the pages of history and the Court decisions and the reason which makes it legally prohibitive to take this power away from our States.

Senator ERVIN. Counsel may call the witness.

Mr. CREECH. Thank you, Mr. Chairman. The next witness this morning is the Honorable Jacob K. Javits, a U.S. Senator from New York. Senator Javits.

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Mr. Chairman, I appreciate very much the opportunity to appear here. I appear in support of the bills which are before this committee, primarily my own bill, S. 480, the administration bill, S. 2750. The subcommittee also has before it the bill introduced by my distinguished colleague from New York, Senator Keating, S. 2979, which is part of a package of bills introduced on March 13, 1962, of which I am also a sponsor.

All of these bills, Mr. Chairman, are essentially designed for the same purpose, to eliminate the abuses of unreasonable literacy tests by setting a uniform maximum and objective standard of a sixth grade education as a conclusive literacy test for voting. I heard the Chair's very interesting statement with respect to the present availability of remedies, and I think it perhaps might sum up my own view if I stated preliminarily why I think this legislation is necessary.

I believe that the Congress has the power where it finds a widespread abuse, notwithstanding the existence of other legislation in the field, to legislate in order to bring about an end to that abuse. I believe that even though remedies presently exist, the Congress may decide that the abuse persists despite the present remedies, and that therefore some other means of dealing with the abuse must be enacted into the law. It is my belief that if that means of dealing with the abuse is itself within the Constitution, then the Congress is in no way inhibited from enacting it into law. There is often more than one remedy for a particular problem which the Government faces.

It is illustrated in this case, because there now is a criminal remedy and a civil remedy, which are adequate as far as they go. But if the Congress finds, and I believe it must find, that the abuse is so widespread that it cannot be brought under control within the proximate time which the public interest requires, except by an across-the-board test of this character, then I think the Congress has the right to develop and to enact a single and conclusive way in which to deal with this problem.

Mr. Chairman, as is well known, I have long advocated abolition by Federal legislation of abuses of the voting right, such as the misuse of literacy tests. The case for the elimination of literacy requirements which are capable of abuse by legislation rather than by constitutional amendment is clear to me. Of course, we are presently engaged on the floor of the Senate in a somewhat parallel problem in respect of poll taxes. As the subcommittee knows, I shall be pressing for a statutory substitute for the anti-poll-tax constitutional amendment now on the Senate floor. My position with respect to literacy test legislation is that it, too, can be done by statute.

I might point out, Mr. Chairman that in his testimony recently before a subcommittee of the House of Representatives, the Attorney General of the United States stated that in his opinion legislation outlawing literacy tests would be constitutional. I think it is rather significant that those who believe that unreasonable literacy tests are a problem which must be dealt with, seem to agree that legislation dealing with them would be constitutional.

Now, Mr. Chairman, the constitutional basis for the literacy test bills is, I think, straightforward. Based upon the authoritative findings of the U.S. Civil Rights Commission that literacy tests have been used in certain States as a means to deprive citizens of a voting right which the Constitution and its amendments make it a Federal responsibility to protect, the Congress may adopt legislation reasonably adapted to end such deprivation.

Mr. Chairman, I think here, too, we begin with another premise which really seems to be accepted almost universally, whatever may be argued about other aspects of equal opportunity. It seems to have been accepted in the 1957 Civil Rights Act and in the 1960 Civil Rights Act, that the voting right is a right which the country overwhelmingly feels must be preserved and protected and insured. And the findings of the U.S. Civil Rights Commission on this subject it seems to me are so dramatic as to be a real shock to the conscience of the country. I deeply believe that the emphasis upon legislation in this field is a response to that feeling on the part of the country.

When the U.S. Civil Rights Commission—and this includes members from the South, as well as members from the North, whatever may be their social systems—can say unanimously that it has found a widespread denial by the use of discriminatory means of the right to vote in 100 counties in 8 Southern States—which statement is made at page 135 of the findings of the U.S. Civil Rights Commission on voting—then I think the country has a right to be affronted and to be shocked and to see that we adopt measures which are reasonably designed to deal with that situation.

Now, article I, section 2, and the 17th amendment of the Constitution permit the States to set the qualifications for electors of Members of Congress. But, Mr. Chairman, and this constantly intrudes in

these legal discussions, we must remember that since those articles of the Constitution were made our supreme law, they have nonetheless been supplemented by amendments—in this case the 14th, the 15th, and the 19th—which also rank on a par with the original provisions of the Constitution itself. In *Ex parte Yarbrough* (110 U.S. 651, 664), as early as 1884, the Supreme Court made it very clear that the 15th amendment is, to use the words of the Court, a—

limitation on the power of the States in the exercise of their rights to prescribe the qualifications of voters in their own elections.

Now, this we cannot ever forget. So often these arguments proceed upon the theory that these amendments were not passed. The rights of the States in respect of what is given them in the Constitution was limited by the 15th amendment, and the Congress was explicitly given the power to implement that limitation with appropriate legislation. This is the hard-rock basis upon which this legislation in my opinion must stand.

I don't think that you have any other considerations here, fundamentally, but that the Congress has a right to find, from a body of evidence which is before it—and we find a fact every time we pass a law; if we didn't find facts we wouldn't pass any law—that the 15th amendment is being violated through the use of literacy tests, and therefore we have the right to enact reasonable legislation in order to deal with that widespread violation. I believe setting a standard of a sixth grade education is reasonable.

There are many cases to support this position, not only where the court has found as a fact discrimination on account of race or color in violation of the 15th amendment (*Guinn v. United States*, 238 U.S. 347 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944); *Davis v. Schnell*, 81 F. Sup. 872 (S.D. 9la. (1949), aff'd 336 U.S. 933)), but also, in *dicta* where such discrimination has not been charged and has not been found to be a fact. (*Lassiter v. Northampton Election Board*, 360 U.S. 45, 53 (1959) and *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937)). I will not go into all these cases with the committee, which is well able to study them itself, except to refer to the *Lassiter* case, the Supreme Court's latest decision on the subject, which restated once again the proposition which I think is elementary law now—and I quote from the court's decision—"Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot." Clearly, therefore, when the Congress finds that there is such discrimination in the use of literacy tests, many of which may be fair on their faces, then the Congress has the right to pass legislation in order to prevent that discrimination from taking place.

Now, Mr. Chairman, the U.S. Civil Rights Commission's finding, among others, was, and I quote from page 137, that "a common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that a voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of 'good character'."

Some of the examples of the discriminatory denial of the right to vote, as testified to before the Commission, are almost an insult to any-

one's intelligence, educated or not. Some of them, for example, are as ridiculous as a misspelling of the word "October," where the witness said the applicant for the right to vote spelled it "O-C-T-O-M-B-E-R," instead of the proper way. And some tests go to the other end of the spectrum and require applicants to qualify to vote by doing what we are trying to do, many of us lawyers of great experience, by defining what particular clauses in the Constitution mean. I doubt very much that any one of us would be able to pass such a test to the satisfaction of some of the others of us, as evidenced from the debates which are taking place on the floor of the Senate, and indeed in this subcommittee.

And so the Commission unanimously recommended, and I emphasize the word "unanimously," that "Congress enacted legislation providing that in all elections in which, under State law, a literacy test, an understanding or interpretation test, or an educational test is administered to determine the qualifications of voters, it shall be sufficient for qualification that the elector have completed at least six grades of formal education," and the intent and purport of these bills is precisely to that effect.

The proposed use of the statutory route to eliminate abuses by setting this standard and objective test is a proper exercise of Congress' power, particularly in view of the Commission's conclusion that county-by-county litigation under existing law by the Department of Justice, no matter how vigorous, is too "time-consuming, expensive and difficult" to be adequate. The Attorney General confirmed this finding from his own experience before a subcommittee of the other body a week ago.

Congress has, we learn from *United States v. Classic* (313 U.S. 299, 320 (1941)), a wide discretion in the means which it will use to safeguard the right to vote. Consequently it has the power to accept the unanimous recommendation of the Civil Rights Commission, and to legislate the sixth-grade standard, the means which the Commission has prescribed.

I don't think, Mr. Chairman, that it would advance the matter particularly to discuss the individual bills and their individual provisions.

However, one of the bills, S. 2979, has a unique provision with respect to qualification in the Spanish language, which merits comment.

Mr. Chairman, I favor the bills, with that provision in it, because I believe that there are so many media in the area in which those who speak the Spanish language are concentrated in New York City, from which I come and which Senator Keating also represents, that they can get adequate information to enable them to be qualified voters on that basis. The fact that New York law does not now allow people to vote if they can qualify only in the Spanish language is an interesting point, but does not in my opinion change the situation before us.

Now, if the proposed test is to be a universally applicable standard, I believe there are so many inducements for our Spanish-speaking people in the United States to learn English that they will learn it soon enough anyhow. And I have no impatience on that score. If they are competent to judge what they are voting for, whether in the English or Spanish language, then they ought to be permitted to vote, and the reforms should apply to us in New York, just as it applies

to every other place in the United States. I am perfectly satisfied as to that.

And finally, one other point should be mentioned, Mr. Chairman, and that is whether or not this statute should be applicable to State as well as Federal elections.

It seems to me that there again the 15th amendment is the controlling law. The 15th amendment requires that there be no denial of the right to vote in any election on grounds of race or color, the grounds on which the U.S. Civil Rights Commission finds that literacy tests, as they are administered, effect a denial of the right to vote. And therefore I believe that the protection of that right to vote, which the 15th amendment permits us to give, should be protection of the entire right to vote.

In addition, as we all know, Mr. Chairman, it is extremely impractical to consider separately elections for Federal and State officials. Hence it is more desirable, when the Congress is dealing with this subject, that it deal with it on an across-the-board basis. Should circumstances compel us to legislate only with respect to the election of Federal officials, I have little doubt that practicality will dictate that the same rule be applied to elections generally, once the Congress acts in this field and its action is sustained as constitutional.

Hence I feel that on practical grounds, whether the legislation in terms applies only to Federal officials, or whether it does not, it shall come to the same end point. And so we might just as well deal with the matter in a realistic and practical way in the first instance.

Mr. Chairman, I would like to conclude by saying that it would indeed be refreshing for our Nation if, notwithstanding the experiences of the past, the Judiciary Committee should report out a civil rights bill without being ordered by the Senate to do so. This is a matter which has been discussed and considered in great detail. It is a matter in which lawyers can finally make up their minds and vote; and this committee has fine lawyers on it. I hope very much that that opportunity will be afforded and that on the floor of the Senate in April, instead of bringing this matter up in some way other than the normal route of a report from a committee. Since we know it will be brought up anyhow, we may have the benefit of the considered judgment of the committee, with a majority and a minority report made by Senators who are voting yea or nay, and that the Senate may then have the refreshing experience of proceeding in the usual way, with a report of the Judiciary Committee upon this measure.

Thank you, Mr. Chairman.

MR. CREECH. Senator, in your statement you have said you feel that the legislation is necessary, and you have alluded to the provisions of the 15th amendment. I wonder, sir, if you feel there are other sections of the Constitution which are relevant to the support of your measure.

Senator JAVITS. Yes, there is no question about the fact that there are other elements of the Constitution which are relevant—whether it is equal protection of the laws in the 14th amendment, or the guarantee of a republican form of government in article II, section 4, or even the times, places and manners of holding elections, in article I, section 4.

But for myself, as a lawyer, I always prefer to base my case upon what is the strongest basis for it. And the 15th amendment in this case, in view of the findings of the U.S. Civil Rights Commission, is so strong a ground for such legislation, that I prefer to base the case on that.

Mr. CREECH. Now, sir, the late James G. Blaine, former Senator and former Speaker of the House of Representatives, was a Member of Congress at the time that the 15th amendment was passed. He has said that the amendment—I am quoting—

did not attempt to declare affirmatively that the Negro should be endowed with the elective franchise, but it did what was tantamount in forbidding to the United States, or to any State, the power to deny or to abridge the right to vote on account of race, color, or previous condition of servitude. States that should adopt an educational test or appropriate qualification might still exclude a vast majority of Negroes from the polls. But they would, at the same time, exclude all white men who could not comply with the test that excluded the Negro. In short, suffrage by the 15th amendment was made impartial, but not necessarily universal, to male citizens above the age of 21 years.

I wonder, sir, if you would care to comment upon that statement.

Senator JAVITS. I think that statement—though that need not be the controlling authority—is quite consistent with everything I have said here so far today.

By basing my own position upon the 15th amendment, I must include in the statement of that position the finding, which has now been made, documented by very complete evidence, by the U.S. Civil Rights Commission, that literacy tests are in fact used to discriminate against Negro voters. And based upon that finding, we have a right to adopt legislation reasonably calculated to deal with the factual situation which has been found. So I think that if Mr. Blaine was sitting in my place, I think he could be perfectly consistent with everything he said while advocating the position which I advocate.

I would like to emphasize this, too, at this moment, if I may: this is nothing unique to me. I am no particular champion in this field. There are men in this Senate who have been at it as long or longer. And I wish in my testimony to include them—Senator Keating, who is here, himself sponsors one of the bills and is a leading champion in this field.

So in stating what I do, though I state it in the first person singular, I don't wish to give any intimation that this is any private campaign of mine, or that I have any special and unique knowledge or position in it. But I am trying to state what I, as a lawyer, and as a Senator, consider to be the situation in which we find ourselves as to the applicability of this legislation.

Mr. CREECH. Senator, Prof. Morton Gitelman, professor of constitutional law at the University of Denver, has reviewed the bills pending before the subcommittee, and he has informed the subcommittee that the 15th amendment is not broad enough to cover literacy tests, since citizens are not being denied the right to vote on the basis of race or color, but rather because they are illiterate. Now, he says that your bill, S. 480, can rest only on the 14th amendment, and this is tenuous, he says, because the right to vote is not a privilege or immunity under the 14th amendment, and it is not a right peculiar to U.S. citizenship.

Would you care to comment upon these statements?

Senator JAVITS. Well, it seems to me that the strongest basis for my bill, and the strongest basis for these other bills, is confirmed by the language I have quoted from the *Lassiter* case, that under the 15th amendment the Congress has the power to look and to legislate behind a literacy test which may be fair on its face. So that while I respect the professor's views, this is a view with which I don't have to agree. Although he thinks legislation must be premised on some other constitutional base, I prefer to premise it on this base of the 15th amendment, where I think it is more apposite especially because of the sustaining effect, as I see it, of the *Lassiter* case.

Mr. CREECH. Sir, one of the criticisms of S. 480 which the subcommittee has received is that the Supreme Court has gone so far as to hold that primaries, in which one political party dominates, are tantamount to a Federal election if a Federal post is involved.

In view of the fact that S. 480 is not limited in application to primaries where the election of a Federal officer is involved, but extends to all State elections, how would you answer this objection?

Senator JAVITS. Well, I think there are two answers to it. One is, of course, that the 15th amendment applies to the right to vote in all elections, and that this is a right over which, if the States have surrendered some power to the Federal Government, which is not reserved to them under article I, because it is covered by the 15th amendment. And second, I would like to cite the authority of *Gomillion v. Lightfoot*, the Tuskegee gerrymander case, in which the Supreme Court said, and I quote from the opinion:

When a State exercises power wholly within the domain of State interest, it is insulated from Federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right.

I believe that we are justified in legislating for all elections upon the two bases which I have stated: The 15th amendment is not limited to Federal elections; and, as stated by the Supreme Court in the *Gomillion* case, State is not insulated from Federal power when it uses its power as an instrument for circumventing a federally protected right. And that federally protected right is the right to vote without being discriminated against or excluded from voting because of race or color. The findings of the U.S. Civil Rights Commission demonstrate that that is happening. So we have a right to legislate against it.

Mr. CREECH. Now, sir, if Congress may legislate relative to a State election respecting literacy requirements in that State, may Congress also legislate respecting age requirements, or residency requirements?

Senator JAVITS. I think that Congress couldn't legislate at all in the voting field as to literacy or any other qualification in the absence of the factual basis which I have described. But if the Congress found as a fact, and the Court sustained that finding, that there is an actual violation of the 14th, 15th, or 19th amendments through the use of any of these techniques of State power, then I think the States have surrendered to the Federal Government the power to legislate in that field by virtue of the fact that the 15th amendment stands on a par with every other provision of the Constitution. I think this is a very important point. There is always inherent in this debate the idea that the amendments to the Constitution can either be forgotten or that, having been adopted later, they have some different standing,

and are not the inspired creature of the Founding Fathers. I will yield to no one in my reverence for the inspired thinking of the Founding Fathers, but they didn't live in our age. That is why we are still adopting amendments. I am sure a number of Senators will be arguing on the floor this afternoon very intensively that we need to adopt even more amendments than we have now. And these amendments when adopted will rank in every way—this was one of the elements of the inspired genius of the Founding Fathers—as if they had been part of the original Constitution. And that is what I am arguing.

Mr. CREECH. Sir, how would your bill be enforced with regard to the sixth grade education? By the applicant satisfying the registrar that he has a sixth grade education? Would the burden rest upon the individual?

Senator JAVITS. I would say that if the registrar challenged the applicant, he would have to produce a certificate showing the completion of a sixth primary grade in a school accredited by any State or by the District of Columbia. And the virtue of that test, as I see it—and it is not merely my test, it is now also that of the U.S. Civil Rights Commission—is its simplicity, and the fact that it therefore is more readily susceptible of actionable proof than is the present effort to prove a discriminatory use of the State test.

Senator ERVIN. If Congress can pass a statute saying that the possession of a sixth grade education can be taken to mean that a person can read and write, why couldn't Congress just pass a law and say it is conclusively presumed that everybody has a sixth grade education?

Senator JAVITS. Well, I don't think they could, Senator Ervin, because our courts would not accept that finding as having any valid basis, and I think they would hold such an exercise of the congressional power as beyond congressional authority.

I would like to point out, in reference to what the Chair is saying and to what the Chair said a little while ago about findings of fact, that certainly the Supreme Court can pass on all these matters. It can accept the findings of fact of the Congress. It certainly has in many cases demonstrated that it gives them very great weight. But it is not concluded by them.

It seems to me that you see that every day in the courts. There are always qualitative judgments. The petit jury which passes on whether the defendant used reasonable care in driving his automobile down Main Street is passing upon a complex question. In the absence of such a finding there would be no jurisdiction, no right to award damages. And it is the same with us.

It seems to me this is inherent in our function. We are passing legislation based upon a condition of fact. If we are being arbitrary or capricious, if we have absolutely no foundation in fact, then the independent judiciary has power to crush our autocratic action just as effectively as to sustain us where we are adapting a measure reasonably adjusted to meet a set of facts which we have found, as part of our legislation.

Senator ERVIN. That raises an interesting question. There is a finding of fact here that literacy tests have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on the grounds of race or color.

Now, I believe you stated that the Civil Rights Commission reported that it has been so used in 100 counties, approximately.

The Library of Congress informs me there are 3,071 counties. Would the election officials in the other 2,971 counties be allowed to say there is not any truth in this, and that, therefore, they can apply their State literacy test?

Senator JAVITS. I think the election officials would be bound by the law, when the law was passed. We pass many, many laws which are applicable to a situation which is not necessarily the situation everywhere in the United States, provided that it has an applicability deserving of congressional action. The word "extensively" is used, which I think is an accurate description for the situation which exists in these 100 counties. Therefore, since the report describes them as stretching across eight States, we have as much right to pass such a law as we would have to pass a law to approve a compact between the States of New York, New Jersey, and Connecticut about the New Haven Railroad, or the water supply, or any one of a dozen matters, which we do, or to pass laws as we often do, which affect a creek in a particular place or a small river running between only two States.

I don't see that the fact that a measure does not have universal applicability to every single county in the United States makes it an invalid exercise of our power.

Senator ERVIN. Well, I infer that in your opinion this recitation in the preamble would not be subject to contradiction in the 2,971 counties in which it would not be true.

Senator JAVITS. I don't quite know what the chairman means by "contradicted." The law would be universally applicable to all of those counties.

It could be argued before the courts that there was no factual basis for our enactment of this legislation, and that argument will undoubtedly be made which my colleague is making that the factual basis which is established in 100 counties is not adequate to justify our enactment of a general law.

It is my opinion as a Senator, and I shall therefore vote "aye" on this bill, that this argument is not an adequate one and that the difficulty is widespread enough, and I emphasize the word "enough," to justify legislation by the Congress.

Senator ERVIN. Well, I am just asking you for the interpretation of your bill. What I am trying to find out—is it your position that your bill, properly construed, would deny to State election officials in a State which has not given any offense, the power to deny the truth of this factual finding.

Senator JAVITS. It would not deny him the power to deny the truth. It would only deny him the power to violate the law.

Senator ERVIN. What I am getting at is this. Would it deny him the power to introduce evidence in a suit brought in the cause of this bill—to say that the factual assertions in the preamble are not true in that State?

Senator JAVITS. He could introduce all the evidence he wanted in the effort to invalidate the law. But if the law was sustained, he would be bound by it, whatever may have been the condition in his county.

Senator ERVIN. Well, I may be a little confused, but that still doesn't answer my question.

My question is whether under this congressional finding—that there have been violations of the 15th amendment in certain areas whether a State could say “We are not covered by this act, because that has not occurred in this State.” Or would this be a conclusive presumption that would bind all the 3,071 counties of the United States.

Senator JAVITS. The finding is not an operative part of the law and is not required to be. It has no operative effect. This operative part of the law would be binding throughout the United States, whatever might be the position of a particular county. There would be nothing in the law which would prevent anybody from trying to prove that it wasn't so in their county. And if that would overturn the law, then of course no one would be bound. But if it failed to overturn the law, everyone would be bound.

Senator ERVIN. In other words, the only operative part of the law in your bill, as I construe it, is section 2.

Senator JAVITS. That is correct. Section 2 is the operative part of the law as far as its effect upon State authorities is concerned. The finding of fact is the basis for the action by the Congress which, under the decided cases, is an aid to the courts in determining the reasonableness with which the Congress acted in dealing with an abuse which it found.

I might tell the Senator that even in the absence of the findings, as I think the Senator knows, the court could sustain a statute by taking judicial notice of a state of facts in the Nation. It wouldn't need these findings. But the findings are helpful in showing to the court the basis upon which the Congress acted. The findings are not the operative part of the law in determining which State officials and individuals are affected.

Senator ERVIN. Well, then, you contend that section 2 of your bill, if enacted by the Congress, would be valid even without the preamble?

Senator JAVITS. Its validity could be sustained even without the preamble. But the preamble is in my opinion important as spelling out the basis for our action and therefore helping in the ultimate decision as to the validity of our action. I think it is a helpful and useful thing, and I hope very much that whatever bill is finally reported out retains a recital of the facts upon which the legislation is based.

Senator KEATING. Mr. Chairman, would the Senator yield on that point?

Is there anything unusual about passing Federal legislation which actually has its operative effect in only a few of our States?

Senator JAVITS. Not at all.

Senator KEATING. One item that comes to my mind offhand is the support for cotton. That is only applicable in a few States, but it is a national law, that we give a subsidy to support cotton. Now, you and I in New York don't grow cotton. But it is somewhat similar to this situation—which applies only to a relatively small number of States, but in which the Federal Government has a valid interest, and authorized to legislate.

Senator JAVITS. Well, there is no question about the fact the Senator has chosen an item which is uniquely illustrative, because it goes to the area from which the very argument emanates that we are legislating in a specialized way.

Senator ERVIN. But your law would not apply to any particular region. It would apply to every one of the 171,840 voting precincts in the 50 States.

Senator JAVITS. Well so would the support price for cotton. It is not inconceivable that we could grow cotton in New York if we wanted to create the physical conditions for it, and that cotton would be covered by the same regulations by which it is covered in Mississippi. And that is what I am sure my colleague implied.

So the mere fact that it does not happen in the other counties does not mean it might not happen.

Senator ERVIN. But, Senator, if your bill should be enacted into law, and be sustained, it would be binding upon the 50 States, in all of their 171,840 voting precincts, and they could not use any test for literacy except the test of whether one has completed a sixth grade education.

Senator JAVITS. I must differ with my colleague there. They could use any test they pleased, but they couldn't disqualify a voter, whether he passed or failed those tests, whatever they may be, if he produced a sixth grade education certificate.

Senator ERVIN. And that would apply to everyone of the 171,840 voting precincts.

Senator JAVITS. Exactly, and it should. That is the purpose of this legislation.

Senator JOHNSTON. Mr. Chairman. Senator Javits in your bill I think you are regulating qualifications of a voter, isn't that true?

Senator JAVITS. Yes, I think that is a fair statement.

Senator JOHNSTON. Well how do you get around article I, section 2, clause 1 of the Constitution, which reads as follows:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualification requisite for electors of the most numerous branches of the State legislature.

They have different and various and sundry statements. How do you get around that section of the Constitution?

Senator JAVITS. I might tell my colleague that we don't get around it all all. It is not necessary to get around it. All we do is add to the 15th amendment. When you add the 15th amendment to what the Senator has read you come fully within the ambit and purview of a whole list of cases, beginning with *ex parte Yarbrough*, decided in 1884, which states:

The 15th amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government and was not intended to be left within the exclusive control of the States. (110 U.S. at 664.)

Senator JOHNSTON. The Senator doesn't quote that case for authority, does he—the *Yarbrough* case? If he does I think you are on mighty thin ice.

Senator JAVITS. The Senator is quoting *Yarbrough* and a whole list of cases, ending with *Lassiter v. Northampton Election Board*, 360 U.S. 45, 53, 1959, to establish the proposition that the section which the Senator has read does not stand by itself but must be read with the 15th amendment to the Constitution.

Senator JOHNSTON. Doesn't that case, though, even bring out that it doesn't deny any State to lay down the rules for the qualifications of a voter.

Senator JAVITS. I do not believe, sir, that this legislation denies that, or that the 15th amendment denies it.

Senator JOHNSTON. I mean that case. It does lay that down, in my opinion.

Senator JAVITS. I am not arguing for that position. I am arguing for the position——

Senator JOHNSTON. But doesn't that case lay down—the Supreme Court ruling in that case you have cited, the *Yarbrough* case.

Senator JAVITS. The Supreme Court lays down the rule in the *Yarbrough* case that the States may, subject to the power of the Federal Government to implement and enforce the 15th amendment, establish the qualifications of voters.

Senator JOHNSTON. But it regulates all the way through. It confines it to manner, doesn't it. It doesn't confine it to who.

Senator JAVITS. No, sir, I am sorry, I cannot agree. The 15th amendment allows us, in the Federal Establishment, to deal with the qualifications of voters. And the courts have held that time and again.

Senator JOHNSTON. The qualifications of the voters only so long as it doesn't interfere and discriminate against anyone.

Senator JAVITS. Exactly right. And the basis of this legislation is that there is a pattern of discrimination, and therefore the legislation is necessary.

Senator JOHNSTON. That is where I differ with you. For most of the States, they lay down general rules for everybody, whether they are white, colored, or whatever creed or organization. They are all the same.

How do you discriminate then against anyone?

Senator JAVITS. Well, the finding of fact, sir, and the decision in the *Lassiter* case make it clear that a literacy test, a qualification test, which on its face may be fair, may nonetheless be dealt with by the Congress if in its administration it is discriminatory. We are, in my opinion, basing this legislation upon the fact that literacy tests have been used for the purpose of discrimination, and the authority for that is the very detailed finding, backed up by the evidence before it, of the U.S. Civil Rights Commission.

Senator JOHNSTON. Isn't it true, though, that in the States, where they make the general, if they violate any law, it is whatever case that comes before them, and then you have a right to the courts at the present time to see that they do receive their rights.

Senator JAVITS. We have the power, if that remedy is inadequate, to establish yet another means for dealing with the abuse. And if we enact this statute, we have found that the civil and criminal remedies which are now provided are inadequate. I believe they are. Both the report of the U.S. Civil Rights Commission and the testimony of the U.S. Attorney General back up the fact that they are inadequate. What we have now is inadequate. We may therefore use other means. And these, in my view, are reasonable means.

Senator JOHNSTON. Well, my opinion and yours differ as far as the east from the west, and my way of looking at the Constitution differs from yours, too.

Senator ERVIN. I would like to say to the Senator from New York what the Chief Justice used to say when lawyers disagreed—that they read the same books but drew different conclusions from them.

Now, I have read the *Yarbrough* case many times. Here is what the *Yarbrough* case says:

They—

that is the States—

define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of the Congress in that State. It adopts the qualifications thus furnished—

that is the qualifications furnished by the States—

as the qualifications of its own electors for Members of Congress.

Senator JOHNSTON. And following that right up, it states further in that case—

Senator ERVIN. And then it also states that the right of the Federal Government to step in occurs only when the right of the persons was thus ascertained—that is the right of a person to vote under State law.

Senator JAVITS. I don't know the page the Senator is reading from in the *Yarbrough* decision. Would the Senator tell me?

Senator ERVIN. I was reading from page 663 and 664 in the official report, and—

Senator HRUSKA. In what volume?

Senator ERVIN. The *Yarbrough* case is in 110 United States.

Senator JAVITS. Well, the quotation from the opinion which I read appears on page 664, and reads

The 15th amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualification of voters in their own election, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States.

That appears right further on in the opinion after the statement which the chairman has quoted.

May I say too, that if my colleagues are invoking the existing civil and criminal case by case remedies then it seems to me that they are conceding the point which I make. Because if the Federal Government has the constitutional power to sue to correct discrimination in an individual case, which I gather the Senator concedes, then surely the Federal Government has the constitutional power to adopt another means to deal with a wide range of cases where it finds that the means it first legislated are inadequate to deal with the situation on a case by case basis. Then we are no longer talking about principle. Once it is conceded that in a single case the United States can challenge an adequacy of the qualification for voting as enforced by a State, then I think the principle is established, and we are dealing solely with what the appropriate means are.

Senator ERVIN. I don't know whether the Senator and I agree. But what I say, and what is said in the latest utterance on the subject, which is in 18 American Jurisprudence, in the supplement, is that the only effect of the 15th amendment—and also of the 19th amendment—on the power of the States to prescribe qualifications, is that they can

no longer prescribe any qualification based upon race, color, or previous condition of servitude under the 15th amendment, or any qualification based on sex under the 19th amendment.

Senator JAVITS. What I am saying is that the Congress, having passed the Civil Rights Acts of 1957 and 1960, has certainly settled the principle that the Federal Government has the constitutional power to restrain a State from using its qualifications in a discriminatory way. Having crossed that bridge, the Congress can then decide what the appropriate means to that purpose are and may enlarge or restrict those means from time to time.

Senator ERVIN. Well, the 1957 law is based upon two constitutional provisions. One of them is the power of the courts to see to it that persons possessing the qualifications prescribed by State law for electors of the most numerous branch of the State legislature, as set forth in section 2 of article I, is enforced; and the other is the power of the courts to see to it that persons denied the right to vote on account of race or color or previous condition of servitude, under the 15th amendment, are allowed to vote. That is in the 1957 law. But the 1960 law is entirely different, as I construe it. The 1960 law is based solely upon the 15th amendment. And all it does is to allow the courts to enter decrees saying that people who possess the qualifications prescribed by the most numerous branch of the State legislature under article 2, or by State law with respect to State elections, shall not be denied the right to vote on account of race, color, or previous condition of servitude. Now, here is where you and I disagree about your law, in one respect.

Your bill the operative part of your bill, would apply to denial of rights on the basis of literacy tests. Your operative part hasn't got a single syllable referring to any denial based upon race whatever. That is the phraseology.

Senator JAVITS. That is the reason why I think the statements of fact are so important. In addition, if we dealt with the situation in any other terms, we would be depreciating its general applicability. We have to deal with it generally based upon a finding that it has been used for purposes of discrimination.

Senator JOHNSTON. Well, you are in this case changing too, the literacy statutes of the various States. And as late a case as 1959 we had before the Supreme Court of the United States—that was a North Carolina case, too, by the way, Senator Ervin—*Lassiter v. Northampton Board of Elections*, 360 U.S. 45. And in that case, it held that the literacy test statutes have been upheld all the way through.

Senator JAVITS. I have just referred to that case as a basis for the proposition that the Congress has constitutional power to look behind a literacy test which seemingly is fair on its face. That is what was discussed in the *Lassiter* case.

It seems to me, therefore, that this is the basis of our entire position: That this legislation rests very heavily upon the findings of fact, whether the findings of fact are written in the bill or not. The United States, if this becomes law, is not changing the tests of any State. The State tests remain just as they always have been. It is simply setting a standard by which discrimination in their use may be avoided. The recommendation of the U.S. Civil Rights Commission is that the

standard of a sixth grade certificate is a way in which people can be protected against the discriminatory use of State literacy tests.

Senator JOHNSTON. You are putting a limitation on the State, though.

Senator JAVITS. You are putting on a limitation. And the cases from *Yarbrough* right through *Lassiter* approve of the proposition that a limitation may be put on where it is necessary in order to carry out the 15th amendment.

Senator HRUSKA. Would the Senator yield?

Senator JOHNSTON. I think you are entirely right, if it discriminated against any class of people. But your bill doesn't state that at all. It doesn't go into that field at all. Therefore, I think it is unconstitutional.

Senator JAVITS. Well, the Senator is entitled to his judgment. I deeply feel that the cases sustain this position and that the facts sustain this position. I feel we derive our support from the line of cases to which I referred. And I would also suggest to the Senator that the opinion of the Attorney General of the United States is not an inconsiderable element in our consideration. He is also a lawyer. That doesn't mean that his opinion is holy or inviolate. But it is the opinion of the Attorney General of the United States that this statute is constitutional and reasonably adapted to serve as the means for effectuating a legitimate purpose.

Senator ERVIN. Here is where you and I reach a diametrically opposite position with respect to your bill. The operative part of your bill, section 1, does not undertake any way, by any syllable in it, to prevent discrimination on the basis of race, color, or previous condition of servitude. I can't reconcile it with decisions—many decisions of the courts, and one was *Karem v. United States*, which was an opinion of the sixth circuit. I use it because it states the proposition so clearly:

The 15th amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualifications of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the State—the power of the State to prescribe qualifications being limited in only one particular, the right of the voter not to be discriminated against in such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote. There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article—

that is the 15th amendment.

First. Legislation authorized by the amendment must be addressed to State action in some form, or through some agency.

Your bill so satisfies that first condition. But the second condition is this:

It must be limited to dealing with discrimination on account of race, color, or condition.

Now, there is not a thing in the operative part of your bill which is limited to dealing with discrimination on account of race, color, or condition. But it is limited to discrimination based upon literacy, which as the Supreme Court said in the *Lassiter* case is neutral as to race and color.

Senator JAVITS. Well, I must say that I find myself completely at odds with the Senator. He is a lawyer, entitled to his view. But I would like to point out that none of these bills, in their operating clauses, does what the Senator desires, and if they did, they would defeat their very purpose.

The purpose of these bills is to establish a uniform standard to prevent discrimination, which discrimination, on the ground of race or color, is found as a fact within the terms of the 15th amendment in every one of these bills. Therefore, having found that as a fact, the Congress, I am arguing, has the right to establish a standard test as a conclusory one, without any regard to the State tests which can continue to be enforced, provided that in the final analysis, they accept this one, which the Congress has established as a means for preventing the discrimination which is forbidden by the 15th amendment. And therefore every one of these bills is exactly the same in that respect: none of them condition their operation upon the existence of discrimination in the voting right in each instance, because, if they did, they would be self-defeating. The inadequacy of a case-by-case approach is precisely why we now have to enact a uniform standard.

Senator ERVIN. I hate to disagree with the Senator so much, but I say there is a very wide distinction between the Senator's bill, that is, 480, and 2750 on this point. The other bill is restricted to what may be called Federal elections, and it attempts to proceed fundamentally under the other provisions of the Constitution relating to Senators and Congressmen. It does have the same preambles as the Senator's bill has. But the Senator's bill quite clearly attempts to regulate this matter in respect to State elections as well as Federal. And only the 15th amendment applies to State elections. The decisions of the court have held—and I am quoting:

But the power of Congress to legislate at all upon the subject of voting in pure State elections is entirely dependent upon the 15th amendment.

Senator JAVITS. That is exactly right. The Senator has now moved away from the point that these bills don't state that you must discriminate in order to bring about the application of the uniform test. The Senator is now saying that my bill applies to elections generally, and the other bills apply to Federal elections only, which is a very different point. And I say in answer to that, that the 15th amendment applies to all elections, and, therefore, my bill applies to all elections.

Now, if the other gentlemen choose to confine their bills to Federal elections, that has nothing to do with the power of the Congress. And all we are considering now is the power of the Congress. The Congress may choose to apply this measure only to Federal elections. But the Congress need not do that.

Senator ERVIN. Well, the Senator and myself are in very wide disagreement, because the courts hold that the power to legislate in State elections is based solely upon the 15th amendment. Of course, we might add now the 19th. The courts have held in numerous cases, as in the one I have just read, that no legislation under the 15th amendment is valid unless it is legislation which is designed to prevent discrimination on account of race, color, or previous condition of servitude.

Now, the operative part of the Senator's bill doesn't have the slightest reference to that, and, therefore, the Senator is trying to legislate generally in the field of literacy tests, upon the basis of the 15th amendment, which does not support any such legislation.

Senator JAVITS. The Senator from New York points out that none of the other bills do either, and the distinction which the chairman makes as to their applying to Federal elections is not the distinction which he is arguing about now. The 15th amendment, precisely as I have said, does apply to all elections. Therefore, the operative section constitutes a means of enforcing the 15th amendment, and that means need not again refer to the discrimination which requires us to fix the standard test.

Now, we will have plenty of time—and I am willing to stay here all day if the Senator wishes me to—to discuss this matter on the floor. But it just seems to me that the Senator and I are not meeting in the argument. The Senator is kind of passing me by—perhaps he feels the same way about me.

Senator ERVIN. Let me ask the Senator. Does not the Senator agree with me in the opinion—I am not talking about anything except the phraseology of these bills now—does he not agree that under the phraseology of S. 2750 that the only elections that are attempted to be dealt with there are elections that are popularly called Federal elections?

Senator JAVITS. The Senator doesn't even agree with that, because the bills state as follows, not that it matters in the argument, but because the Senator wants my interpretation of the language of these statutes. I am reading now from page 3, lines 11 and 12, of S. 2979; and I am reading also from page 3, lines 22 and 23, of S. 2750:

Federal election means any general, special, or primary election held solely or in part for the purpose of electing or selecting—
and so on.

Now, it seems to me that that clearly contemplates that if it is just one election that is being held, then it will cover the whole electoral process no matter what offices are being filled. So I don't think even those bills purport to confine themselves strictly and absolutely to Federal elections. And again I point out that this is not the point the Senator is making at all. The Senator's point, as I understand it, is that these bills are required to make the operative section apply only if discrimination is proved. And I say that the Congress doesn't have to do that—once it finds that there is a general pattern of discrimination on the grounds of race or color for which literacy tests are being used. Now, that is the fundamental issue between us.

Senator ERVIN. I understand the Senator to state that it is his considered opinion that there is no difference in substance between section 3 of S. 2979, and section 2 of S. 2750, and section 2 of his bill.

Senator JAVITS. This is a totally different question, and there is a difference in substance. The difference is that the State could run a separate election for State and Federal offices under the other bills; but under my bill, whether it did or did not, it would be bound in both elections.

Now, that is the difference. There is a difference in substance. But what the Senator asked me before is whether these bills applied solely

to Federal elections. And I said I didn't even agree with that, because the words "solely or in part" qualify even that judgment.

Senator ERVIN. Now, let's see if we can't agree on some English. Is it not true that under S. 2750, that there is no effort to legislate as to any voter except to the extent that voter participates in voting for Federal officials.

Senator JAVITS. If any part of an election is voting for Federal officials, then it applies to the whole election.

Senator ERVIN. Well, I don't think the Senator and I can agree. But I can show you many decisions where indictments have been quashed because they failed to allege that a man who voted at an election in which voting for Federal officials and State, cast his vote solely for Federal officials.

Senator JAVITS. Well, if the Senator will show me the decisions—and he will have to show me the statutes upon which the decisions were based. I am talking about S. 480, my bill, as contrasted with the other bills. That is the only thing I am talking about. And that would then be the operative statute.

Senator ERVIN. I just received notice the Senate is taking up the Holland amendment.

Senator JAVITS. I have to go, Mr. Chairman, if I may. I have an amendment to that bill as the Chair knows. I will be glad to come back if the Chair desires me to.

Senator ERVIN. You and I have disagreed very frequently on these matters. I had thought we had come to an area of agreement—that we had agreed that your bill referred to all elections, and would regulate all elections, in this respect, and S. 2750 would regulate what we call Federal elections. But I find we don't even agree on that. I am very disappointed we didn't find one area of agreement.

Senator JAVITS. Yes, sir. Thank you, Mr. Chairman.

Mr. CREECH. Mr. Chairman, the next witness is the Honorable Lister Hill, Senator from Alabama.

Senator ERVIN. Senator Hill.

STATEMENT OF HON. LISTER HILL, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HILL. Mr. Chairman, I recognize that the Chair and the Senator from Alabama have to go to the floor of the Senate.

May I file my statement with the committee and make this statement—that all one has to do to understand how these bills attempt to do violence to the Constitution of the United States is simply to read the statement of the distinguished chairman of this committee, which was made on the floor of the Senate of the United States on March 15 last. And I want to say that I am unalterably opposed to these bills. There is no basis whatever in the Constitution of the United States, in the 14th amendment or in the 15th amendment, or any authority whatever in any shape, fashion, or form, for the Congress of the United States to pass these bills. I agree wholeheartedly with all that has been said here this morning by the distinguished chairman of this committee, Senator Ervin, of North Carolina, and also by the distinguished member, Senator Johnston, of South Carolina, about these bills.

There is no basis whatever that gives any authority or any power to the Congress to enact this legislation as embodied in these bills. They fly right into the teeth of the Constitution, and into the reserved powers of the States, as has been so well brought out here, in section 2, article I. I thank the chairman.

(The full statement of Senator Hill follows:)

STATEMENT OF SENATOR LISTER HILL IN OPPOSITION TO S. 2750, S. 480, AND S. 2079

Mr. Chairman, I am unalterably opposed to S. 2750, S. 480, and S. 2079. These bills would prohibit the use of literacy tests such as the one we presently have in Alabama and a number of other States to determine whether prospective voters possess the minimum knowledge and comprehension prescribed by the laws of Alabama and the other States as a necessary qualification for voting.

In effect, each of these bills would outlaw existing State literacy tests so far as they apply to prospective voters who have completed the six primary grades of school. Two of the bills, S. 2750 and S. 480, provide exceptions in the case of those adjudged mentally incompetent. No exception is provided under S. 2079. The application for S. 2750 is restricted to those seeking to qualify for voting in Federal elections, while S. 480 and S. 2079 would apply to all elections including State and local elections.

In addition to the State literacy tests, one of the bills, S. 2079, would abolish all other qualifications for voting except those relating to age, residence, legal confinement, or conviction of a felony. This bill would also proscribe interference with the right to vote through arbitrary action or inaction, and would require the Director of the Census to compile voting statistics, by race, color, and national origin.

I am unalterably opposed to these bills because they seek to further restrict the reserved powers of our States to determine the qualifications of their voters. If passed, these bills would constitute a totally unwarranted, unnecessary and unjustifiable invasion of State powers and functions that are secured and reserved to the States by the Constitution.

In short, each of these bills seek to impose a Federal literacy standard on the States. They would supplant any State laws that provide a different literacy requirement for voting than the Federal standard. All of these bills are unconstitutional inasmuch as Congress has no such power over the States.

As we know, at the time the Constitution was written back in 1787, the States had diverse qualifications for suffrage, and almost all of them had property qualifications of one sort or another. In the very beginning, article I, section 2 of the Constitution vested in the State governments the power of fixing the qualifications for voters. This section provides as follows:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite to electors of the most numerous branch of the State legislatures."

How could any language be clearer? It would seem that nothing could be clearer than the language in this section of the Constitution. When we consult Madison's notes, and the other authorities, we find that there were three schools of thought in the Constitutional Convention with reference to the matter of qualifications of electors to vote for Members of Congress.

One school of thought felt that the qualifications should be prescribed in the Constitution itself.

The second school of thought felt that the question should be left to Congress.

The third school of thought, which as we know prevailed at the Constitutional Convention, was that the qualifications for the electors should be those fixed by the States for the most numerous branch of the State legislatures.

Congress was not given any power to prescribe the qualifications for voting and this omission was absolutely deliberate. When the Founding Fathers desired to give Congress power to alter State rules with respect to the times, places, and manner of holding elections for Senators and Representatives, they specifically did so in article I, section 4.

Nor can it be argued that the 14th or 15th amendments gave Congress any such power. A check of the record will indicate that when the 14th and 15th amendments were submitted by Congress, there was no thought, no suggestion that Congress could step in and by legislative enactment fix or prescribe the qualifica-

tions of the electors for Members of Congress or the qualifications of the electors for President and Vice President.

Without regard to any argument that the States may not violate the express prohibition of the 15th amendment or otherwise arbitrarily discriminate against prospective voters in violation of the 14th amendment, it is clear that Congress has no general authority to alter, change, or supplant the specific qualifications of voters that are prescribed by law in the various States. This, of course, includes literacy qualifications.

Some 124 years after the adoption of the Constitution, when the people of the United States saw fit to change their method of electing U.S. Senators they provided, in the 17th amendment, as follows:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years; and each Senator shall have one vote."

Then there is this language:

"The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The express language of the 17th amendment, adopted in 1913, ratified and reaffirmed the wisdom of the Founding Fathers and of the original States in providing that the qualifications of the electors for Members of the Senate should be the qualifications requisite for electors of the most numerous branch of the State legislature.

As we know, for half a century some of the finest, most patriotic, and noblest men and women in our country carried on the campaign for the removal of sex as a qualification for voting. But if we examine the record, we do not find anywhere that any leader in the cause for woman's suffrage ever suggested that women could by legislative enactment by Congress be granted the right to vote.

The Supreme Court decisions support what I have said about the power of the States over suffrage and with respect to the clear language and meaning of article I, section 2, and the 14th, 15th, and 17th amendments. (*Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Ex Parte Clarke*, 100 U.S. 399 (1879); *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Mason v. Missouri*, 179 U.S. 328 (1900); *Swafford v. Templeton*, 184 U.S. 487 (1902); *Pope v. Williams*, 193 U.S. 621 (1904); *Guinn v. United States*, 238 U.S. 347 (1915); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *United States v. Classic*, 313 U.S. 299 (1941); *Davis v. Schnell*, 81 Fed. Supp. 872, aff'd 336 U.S. 933; *Butler v. Thompson*, 341 U.S. 987 (1951); *Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).)

In addition, there is ample authority for the proposition that State imposed literacy tests as a qualification for voting are in accordance with the Constitution. *Guinn v. United States*, 238 U.S. 347; *Lassiter v. Northampton Elections Board*, 360 U.S. 45; *Pope v. Williams*, 193 U.S. 621; and *Mason v. Missouri*, 179 U.S. 328. In the *Guinn* case the Supreme Court held that the 15th amendment does not destroy the rights vested in the States by article I. The Court said:

"Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the devision of State and National authority under the Constitution and the organization of both governments rest would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment recognizes the possession of the general power by the State, since the amendment seeks to regulate its exercise as to the particular subject with which it deals."

Proof of literacy as a condition to voting may be established as a "qualification" within a State's power under the authority reserved to the States by article I, section 2, and the 17th amendment. This question was put to rest by the Supreme Court in *Lassiter v. Northampton Elections Board*, supra. The Court unanimously held that the imposition of a literacy test by the State of North Carolina came within the State's power to prescribe voter qualifications and that absent any showing that the test was applied in an arbitrary or discriminatory way, such a qualification did not violate the 14th amendment. In the *Lassiter* case, decided in 1959, the Court said:

"We come then to the question whether a State may consistently with the 14th and 17th amendments apply a literacy test to all voters irrespective of race or

color. The Court in *Guinn v. United States*, supra, at 366, disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.'

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633; *Mason v. Missouri*, 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns. Article I, section 2 of the Constitution in its provision for the election of Members of the House of Representatives and the 17th amendment in its provision for the election of Senators provide that officials will be chosen 'by the people.' Each provision goes on to state that 'the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.' So while the right of suffrage is established and guaranteed by the Constitution (*Ex Parte Yarbrough*, 110 U.S. 651, 663-665; *Smith v. Allwright*, 321 U.S. 649, 661-662) it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."

I fail to see how it can seriously be argued that the Congress has any authority to legislate on this subject in view of the *Lassiter* case. At this point, I would like to again emphasize one thing. The express purpose of S. 2750, S. 480, and S. 2979 is to impose a Federal literacy standard on our States with respect to the qualifications of their voters.

What if a State determined that a seventh or eighth grade education was proper, in lieu of the federally prescribed sixth grade education? The point I am raising here is that these bills seek to substitute a Federal standard for those of the States. They would do this without regard to the validity or constitutionality of the various State standards which they would supplant.

If Congress passed either of these bills, it would constitute a clear usurpation and invasion of the reserved rights of our States. Indeed, we would be grossly derelict in our sworn duty to support and defend the Constitution, if we were to pass these bills and embellish them with that presumption of constitutionality that is accorded to the acts of Congress.

Let us be done with these measures which we know are brought here under the pressure of political expediency. Let us support squarely the rights of the people of the United States and the rights of the States of the United States that our Government may be preserved.

Senator ERVIN. I would like to ask the Senator just one question. Is it not true that the Supreme Court of the United States held in *Williams v. Mississippi* that the literacy test of Mississippi complies in full measure with the Constitution of the United States.

Senator HILL. The Senator is exactly right. And in my statement, I cite and quote from the case of *Karen v. United States*, because it is clearly and directly on the very point so far as these bills are concerned—that the Federal Government has no right to impose any literacy tests, that the State has this right, under section 2 of article I of the Constitution of the United States.

Senator ERVIN. I would like to ask the Senator this. As a matter of fact, haven't the Federal courts upheld, as a valid constitutional enactment, the literacy tests of Mississippi, the literacy test of North Carolina, and the literacy test of Louisiana, and have not the Federal courts adjudged that none of those literacy tests violated the 14th or 15th or the 19th amendments.

Senator HILL. The Senator is exactly right. And the most recent case was the North Carolina case, the *Lassiter* case of 1959.

Senator ERVIN. I will ask the Senator this. When these bills are reduced to their ultimate analysis, don't they undertake to say that these literacy tests are unconstitutional and violate the 14th amendment and the 15th amendment to the Constitution, notwithstand-

ing the fact that the Federal courts in which the entire judicial power of the United States is vested, has held exactly to the contrary.

Senator HILL. The Senator is exactly right. In other words, these bills fly right into the teeth of decision after decision by the Supreme Court of the United States.

Senator ERVIN. In other words, what these bills say in effect is that the Constitution itself is unconstitutional.

Senator HILL. That is exactly right.

Senator ERVIN. We will take a recess until 2 o'clock.

(Whereupon, at 12:45 p.m. a recess was taken until 2 p.m. of the same day.)

AFTERNOON SESSION

Senator ERVIN (presiding). The subcommittee will come to order.

I have informed Senator Talmadge that I thought we would reach him about 2 p.m.

Senator Case, who has been scheduled before you, has very graciously said it would be all right to call you, so we will call either one of you.

Senator TALMADGE. Mr. Chairman, I certainly would not want to preclude Senator Case. How long will your testimony take?

Senator CASE. Subject to the questions of the committee, my own presentation, I should think, would take about 5 minutes.

Senator TALMADGE. Mine will take longer than that, Mr. Chairman. Under those circumstances, I would prefer to yield to Senator Case and let him proceed, because mine will take considerably longer than 5 minutes.

Senator ERVIN. Senator Case was scheduled to precede you, so we will proceed with Senator Case.

STATEMENT OF HON. CLIFFORD P. CASE, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator CASE. Mr. Chairman, I appear in support of S. 480. My discussion also supports S. 2750, introduced by Senator Mansfield for himself and Senator Dirksen.

Both bills relate to limiting the use of the literacy test in establishing the qualifications of voters.

I prefer S. 480 because it applies not only to Federal elections, as does S. 2750, but also to all other elections in the States. But the same general justification for both bills exists.

Mr. Chairman, I have a prepared statement which, with your permission, I would like to have filed and included in the record in extenso, if I may.

Senator ERVIN. Yes, the statement will be received and printed in full in the record at this point.

(The statement referred to is as follows:)

STATEMENT BY SENATOR CLIFFORD P. CASE, COSPONSOR OF S. 480

The first statutory duty of the Commission on Civil Rights is the investigation of discrimination with regard to voting. Thus, in establishing the Commission, Congress once again recognized the primacy of that right as the keystone of our political system.

Unfortunately, as the Commission's field investigations have made abundantly clear, the right to vote is still too often honored in the breach, rather than the

observance. The evidence is indisputable. It is set forth at length in the Commission's 1961 report on voting.

In that report the Commission was careful to point out that in the last 20 years significant progress has been made in eliminating systematic exclusion of Negroes from suffrage. Nonetheless, its study shows that in 1961, arbitrary denial of the right to vote exists on a substantial scale in eight Southern States. In some of these States the denial is widespread throughout the State, in others there is a kind of "local option" exercised by the counties. For example, in 23 counties of 5 Southern States no Negroes are registered, although similarly populated counties in each of these same States have large Negro registration. Overall the conclusion is inescapable that a substantial number of citizens are being deprived of their right to vote.

The findings of the Civil Rights Commission came as no surprise. Rather, they document a situation which I suspect all of us knew existed. But they do point up sharply the urgency of Federal action to protect this most basic right and our responsibility under the Constitution as Members of Congress to provide that protection.

The bills pending before the subcommittee would establish an objective standard by which to determine literacy whenever such a qualification is prescribed by State law. It would strike at the abuse and manipulation of this requirement which has been used all too effectively to disenfranchise otherwise qualified voters because of their race. Obviously if you are not registered, you cannot vote. Hence, the resort to all sorts of devices and grounds to refuse registration to Negro applicants.

The report of the Commission on voting is replete with instance after instance of unreasonable and arbitrary refusal on the flimsiest of grounds to register Negro applicants. Many, perhaps most of them, involve the literacy qualification.

Among the cases cited by the Commission is that of a young Negro veteran whose application form was refused because he underlined the word "mister" when, according to the registrar, he should have circled it.

The inquiry in Macon County, Ala., brought out a number of shocking instances of the use of the literacy test as a device for rejecting Negro applications. Some idea of its usefulness for this purpose is indicated by the 1960 registration figures for nonwhites in that county. Although nonwhites constitute 83.5 percent of the total population, only 8.4 percent of the nonwhite population of voting age was registered. So flagrant was the abuse of the literacy test that the district court in *United States v. State of Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961) specifically forbid its use in a discriminatory manner. Noting that the majority of the Negroes in the county live or work in Tuskegee, site of Tuskegee Institute and a Veterans' Administration hospital, and that most of these have college or high school educations, the court said, "The discrimination against these Negroes has been so effective that many have been unable to qualify as voters, while many white persons who have not finished grammar school have been registered." In Macon County as a whole less than 10 percent of the Negroes of voting age were registered. This contrasts with the registration of virtually all of the white people of voting age.

The court in this case found a clear pattern of practice of discrimination and it issued a decree which, if carried out in good faith by the defendants will restore the integrity of the registration and voting process in that county.

It is true too that there have been other encouraging decisions in registration cases. The first suit under the 1957 Civil Rights Act was the *Raines* case, filed in September 1958, *United States v. Raines*, 172 F. Supp. 522 (M.D. Ga. 1959). Dismissed in the lower courts, the case was taken to the Supreme Court which reversed the decision in 1960, 362 U.S. 17 (1960), 189 F. Supp. 121 (M.D. Ga. 1960). The second case filed, *United States v. State of Alabama*, I have already mentioned. *United States v. McElveen*, 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La. 1960), 362 U.S. 58 (1960) was the third. That case also ultimately resulted in an injunction against a discriminatory purge of the registration roles and direct restoration of some 1,300 Negroes who has been purged.

In each of these cases the final decision found for the plaintiff, the United States, suing for preventive relief under the 1957 and 1960 Civil Rights Acts. I have no doubt that wherever discrimination is conclusively demonstrated, the courts will act to right the situation. But, as the citations in these cases alone show, litigation involves a long, costly, and torturous course. Surely ordinary citizens ought not to have to turn to the Attorney General of the United States to secure their plain constitutional rights. Congress has, I believe, an affir-

native responsibility to act in the face of blatant discrimination barred under the Constitution.

It is important to point out that the proposed legislation in no way impinges on the power of the States to set voting qualifications under article 1, section 2. As the subcommittee knows, that section provides in part:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Section 4 of article 1 also provides in part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The power given to the States by the Constitution in respect to setting qualifications is not, however, unlimited. It is subject to certain constitutional prohibitions, among them the 14th and 15th amendments. These amendments state in part:

Fourteenth amendment, section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth amendment, section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The 15th amendment, as the subcommittee knows, provides:

Section 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2: "The Congress shall have power to enforce this article by appropriate legislation."

I reiterate that this amendment would not do away with a test of literacy where such is prescribed by a State. All it would do would be to assure that that test should be applied fairly and equally to all citizens of the State by assuring that completion of six grades of education, shall satisfy the requirement.

Admittedly, enactment of S. 480 will not end all arbitrary and unreasonable denial of the right to vote to certain of our citizens. It would, however, remove a major obstacle that has thwarted the efforts of citizens seeking to assert their rights. Both our parties are pledged to eliminate discrimination in the field of voting rights.

To me the duty and responsibility of the Congress is plain. We can best demonstrate our own dedication to the principle which is the foundation of our whole political structure by favorable action on S. 480.

Senator CASE. Just to summarize it very briefly, the substance of both bills, the majority leader's and minority leader's bill being limited to Federal elections, is that it would establish the right, insofar as tests of literacy, education, or interpretation, intelligence, were concerned, establish, in effect, a conclusive presumption that those tests are met in the case of any individual who has completed the sixth grade in an accredited school.

There are slight differences between the two bills in this regard, but that is the substance of it.

This would be subject, of course, to being rebutted in the event of an individual who had been found to be legally incompetent.

The basis for Federal action in this field, of course, is the fact that, as found by the Commission, the Civil Rights Commission, after exhaustive study, the abuse of literacy tests has existed on a widespread scale in a number of States, and in some States in many counties, to prevent individuals who ought to be able to vote from qualifying to vote.

There have been, as the subcommittee, of course, knows, a number of cases brought by the Federal Government in which the right to vote has been established on a case-by-case basis. But the evidence produced by the Commission in its 1961 report, with which the committee is very familiar, I know, establishes that this is such a widespread matter that it seems very clear that we would be doing less than our duty as a Congress if we failed to provide some other more expeditious and more comprehensive means to eliminate the abuse which has been found to exist. My statement, Mr. Chairman, summarizes the evidence produced by the Commission of the need for this legislation.

It also refers to a number of court cases in which discrimination has been found and in which the courts have taken action to eliminate it on a case-by-case basis.

It also refers conclusively, I think, to the provision of the Constitution under which legislation of the sort involved in the bills pending before the committee have a sound constitutional basis.

I do hope that the committee in its wisdom will, after consideration of testimony from those both for and against this general proposition, and the evidence, especially, of the report of the Commission, will see fit to report favorably a bill which embodies, in substance at least, the provisions of S. 480, of which I am one of the cosponsors.

With that, I am quite content to leave the matter on the basis of my prepared statement, Mr. Chairman, subject to any questions, of course, that the committee may have.

Mr. CREECH. Senator, I notice that you are cosponsor of S. 480, and that you have also cosponsored the bill which Senator Keating introduced last week, S. 2979.

Senator CASE. That is right, and I should have mentioned that.

That includes a provision along this line, among many other provisions, recommended by the Civil Rights Commission.

Mr. CREECH. I wonder, sir, if you would care to comment on the difference between these bills, and indicate what preference you have for one over the other?

Senator CASE. I do not have in mind the exact provisions of the more recently introduced bill in regard to this particular subject, and so I am obliged to ask that I be given an opportunity to compare the specific provisions of that bill relating to the literacy test and S. 480, which I shall be happy to submit for the record.

In general, of course, it deals not only with that—that is, the later bill—but with many other of the recommendations of the Civil Rights Commission.

Mr. CREECH. Sir, S. 2979, the bill which you and Senator Keating and a number of other Senators cosponsored recently, would provide for changing the voting laws in 45 of the 50 States.

I wonder, sir, what is the constitutional basis for such a measure?

Senator CASE. The constitutional basis for all that legislation is the provision of the Constitution, itself; that is, the provisions of article 14, article 15, and article 19, too, which provide for no discrimination in voting rights, provides for equal protection of the laws, which provide that no State shall take away the rights of citizens, and in each case give the Congress the right to pass laws to implement those substantive provisions.

MR. CREECH. Sir, would this bill not go much further in that it would limit the qualifications for voting, or the denial of registration to vote, to the inability to meet the age requirement, the residence requirement, or legal confinement at the time of the election or registration, or prior conviction of a felony or failure to meet the literacy requirement as provided in section 3. The State is limited, as this bill provides, to requiring only those five qualifications, and it means, of course, that there are many areas in which the State would be precluded from prescribing qualifications. For instance, in your State of New Jersey, I believe, article 2, section 3, of your constitution, and section 19-14 of the State statutes of New Jersey, provide, among other things, that idiots or insane persons, persons convicted of a number of crimes, including some misdemeanors, would be disqualified for voting.

I wonder, sir, what your feeling is about what effect this particular bill would have on your own State of New Jersey?

SENATOR CASE. I must confess, sir, that I have not had that specifically before me recently.

I looked it over in general terms when I introduced it, and I will be happy, indeed, to tell you that in general terms, of course, the theory of the later bill that you are discussing now is that, except in these particular areas, there have been sufficient evidences of abuse of the State's constitutional authority with respect to setting qualification of voters to justify limiting it to those categories that you mentioned.

Now, I think you can make an argument that the specific exceptions in the later bill are not broad enough to cover some of the provisions even of the New Jersey constitution, and I think this is possible.

I do not think the conflict would be as deep or as extensive as you suggest, but that there would be some, I think there is no doubt.

MR. CREECH. Sir, there are some States throughout the country which require prospective voters to take a loyalty oath, and there are others which disqualify for voting anyone who has received a dishonorable discharge from service.

Now, is there any evidence which you know of—there is certainly none in the Civil Rights Commission report—to indicate that these requirements are used to discriminate on the basis of race? According to this bill, the State would be precluded from having such requirements.

SENATOR CASE. I think you are probably right. I do not know of any evidence myself on the basis of that to deal with those particular things. I have not had them in mind.

I think you could imagine a good many other possible legal justifications that might be dreamed up or some that exist in various State laws and State constitutions which would conflict with this, on which a difference of opinion might exist.

But on the general principle that, subject to these broad categories, the idea of quite strong Federal legislation to limit the area of a State's activity in this connection, I think, would be justified.

But I do say again that, regardless of the soundness of the later bill—and I think, quite frankly, there is a good deal more question about its soundness in certain respects than there is about S. 480 or the bill introduced by the majority and minority leaders—that on the latter bills there could be no question, it seems to me, whatever.

And if we should take this matter a step at a time, as probably makes sense, I suggest we take the first step now, and at a time when hearings on the more extensive and comprehensive bill have been set, I shall be happy to come back and attempt to deal with or frankly admit, if I find it so, that that bill goes too far.

Mr. CREECH. Sir, the subcommittee was told this morning with regard to S. 480 that the State tests would remain as they have been. S. 480 is a limitation upon the tests only insofar as it prescribes certain requirements which the drafters of that legislation feel are necessary to implement the 15th amendment.

Now, approximately 100 years ago, the Massachusetts Supreme Court in *Stone v. Smith* said that the purpose of the Massachusetts literacy test was to insure an independent and intelligent exercise of the right of suffrage. Under S. 480, there is the provision, of course, that any person completing six grades of education in a State-accredited school can reasonably be expected to be literate.

I wonder, sir, if you feel this provision of S. 480 is necessarily consonant with the decision of the Supreme Court of Massachusetts, a decision which, incidentally, has been widely quoted in innumerable cases since that time as the basis for the various State literacy tests, thus insuring an independent, intelligent electorate?

Senator CASE. It seems to me that the substance of the purpose of the Massachusetts statute, as expressed by the decision you refer to, is met by the proposed legislation here; that it creates a conclusive presumption that literacy, comprehension, intelligence, or what you will, sufficient for exercise of the privilege of voting is met by a satisfactory completion of six grades of education in an accredited school is certainly true, and this matter is not open for examination, or would not be independently, if this legislation is adopted.

Mr. CREECH. Sir, continuing along this line of thought, I wonder if you are familiar with a statement made by the Secretary of Health, Education, and Welfare in a letter directed to Vice President Johnson earlier this year concerning the President's proposal for the advancement of adult literacy in the United States.

At that time Secretary Ribicoff stated that there are 20 million Americans over the age 25 who cannot adequately read an English language newspaper; only 8 million of those have completed less than 5 years of school.

Do you feel, sir, that this statement by the Secretary of Health, Education, and Welfare would mitigate against a congressional finding of fact that a sixth-grade education is a conclusive presumption of literacy?

Senator CASE. Mr. Counsel, no one could be more anxious than I am to raise the standard of education, or whatever the proper word is, of people of the United States, and I have been interested in this for years as a member of the Committee on Education, Labor, and Welfare here, and first with the Committee on Education and Labor in the House.

And we can improve our schools. We can improve the level of understanding of the people of this country, and I am not excluding Members of Congress, including specifically myself. That is certainly true.

When the Secretary makes a statement about not satisfactorily or adequately understanding, I am not exactly sure as to the quotation from his remark—he is talking about something that is desirable, and improvement is always desirable.

But I am sure that he would be the last person to suggest, even though he might stand on that statement for the purpose for which it was made, that those 20 or 40 million, or whatever it was that he mentioned, be excluded from voting because their level of comprehension of the written word could be improved, in his judgment.

Mr. CREECH. Sir, I was just directing that in the context of the presumption in the bill.

Senator CASE. I understand, and I think that it is fair to say, although I have not seen him quoted specifically on this, that, as a loyal member of the administration and in his own right, notwithstanding the statement that you refer to, that you attribute to him correctly, I am sure, he would strongly support this bill, both these bills, and all the recommendations of the Civil Rights Commission, and I would think that perhaps a question as to how we reconcile the two statements might better be addressed to him.

Senator ERVIN. There is a rollcall vote. We have not had any signal, but there is a rollcall vote in progress right now on the Senate floor.

We will be in recess.

(Whereupon, a short recess was taken, after which the hearing was continued.)

Mr. CREECH. Shall we proceed, Mr. Chairman?

Senator ERVIN. Yes.

Mr. CREECH. Senator, I should like to go now to S. 480.

Senator CASE. May I say, before you do that, Mr. Chairman, that I understand that those who were scheduled to be witnesses today were asked or were supposed to be asked to be prepared to testify not only on S. 480, of which I am a cosponsor, and S. 2750, but also on this later bill to which counsel has been referring.

The message apparently did not get through to me, and so, to my regret, I am not prepared, or was not prepared, to discuss questions on the basis of the kind of preparation that it is my custom to make before appearing before a committee of the Senate, and I shall be happy to do that at another time, or in answer to questions that may be submitted for the record.

But I would not want my relative unfamiliarity with a particular subject matter of the last-mentioned bill to be taken as in any way a reflection upon my judgment about what this committee is entitled to.

It is entitled to the best, of course.

Mr. CREECH. I am sorry we did not get that word to you. You will, of course, have an opportunity, sir, if you care to do so, to elaborate on your answers.

Sir, the professor of constitutional law at the University of Denver, Morton Gitelman, has told the subcommittee, after reviewing S. 480, that the 15th amendment is not broad enough to cover literacy tests, since citizens are not being denied the right to vote on the basis of race or color, but, rather, because they are not literate.

Would you care to comment upon this assertion?

Senator CASE. I think I disagree with him quite specifically, but I would, in addition, point out that our justification of the constitutionality rests not only on the 15th, but the 14th as well, and perhaps on the 19th.

But, on the specific question that the professor raised, I think I am in disagreement with his conclusion. Whatever may appear on the surface, I think it is quite clear that the facts show, and the record established by the Civil Rights Commission makes it abundantly clear, that, by the use of literacy tests or, rather, their abuse, the rights of citizens under section 1 of the 15th amendment have been abridged because of their race and that, therefore, the legislation we propose has a constitutional basis because there is a factual need for it.

Mr. CREECH. With regard to this proposal being based also on the 14th as well as the 15th amendment, Professor Gitelman again says that S. 480 can rest only on the 14th amendment, and that this is tenuous because the right to vote is not a privilege under the 14th amendment and is not a right peculiar to U.S. citizenship.

I wonder, sir, if you would care to comment upon that statement?

Senator CASE. It seems to me that the language itself of section 1 of the 15th amendment is contrary to the professor's contention, and certainly—

Mr. CREECH. Excuse me, sir, did I say the 15th? I meant the 14th.

Senator CASE. Yes, you did say the 14th, and if I said the 15th, I meant the 14th. I am sorry.

The last clause, of course, prohibits a State from depriving any person, citizen or not, of life, liberty, or property without due process of law, to deny to any person within its jurisdiction equal protection of the laws, and I think I rest not exclusively, but most heavily, on the constitutional justification on that clause.

Mr. CREECH. Sir, the subcommittee was told by the professor of constitutional law at Rutgers University, Mr. Beutel, that it is his feeling that S. 480 should be amended by adding the words at the end of the bill, to that section of the bill which would be section 2, subsection (a), of section 204 Revised Statutes, 42 U.S. 1971: "Such literacy test is used for the purpose of restricting the right of a person to vote on account of race, color, or sex."

He says, in addition, sir, that this would make the statute constitutional, and save it from attack.

Would you object to this amendment?

Senator CASE. It seems to me that it is not necessary, and that it might destroy the efficacy of the legislation, because it would leave open the question in each case to be decided, presumably, through court action in each individual case, the very matter that we are hoping by general legislation to handle in a way that will not require that the matter be litigated in every case.

Mr. CREECH. The subcommittee has also been told that this bill, S. 480—and I am quoting again—"Clearly violates the constitutional rights which have been reserved to the States in suffrage matters. The act undertakes to impose its arbitrary standards on all types of elections which may be held in a State. Its arbitrary standards would relate to State, county, and municipal elections where no Federal office is even at stake. The imposition in this bill of a single arbitrary standard is contrary to the scope of the power given to the States in suffrage

matters and as interpreted by the Supreme Court of the United States."

Senator CASE. Of course, I cannot accept the conclusion that it would be unconstitutional.

I agree that it does apply to all elections, including those referred to in the statement which you quote.

I think it is proper to do so.

I think the factual justification for doing so does exist, and I think that it is constitutional and within the power and the obligation of the 14th amendment.

Mr. CREECH. Sir, with regard to the sixth-grade education provision, what would be the element of proof required and how would this particular section be enforced?

Senator CASE. I am not quite sure I understand what you mean. If you have in mind by what sort of document proof would be given—

Mr. CREECH. Yes, sir.

Senator CASE (continuing). That a person had completed the six grades of education referred to in the bill—

Mr. CREECH. Yes, sir.

Senator CASE (continuing). I suppose that it is possible, I think it is quite usual to get certificates from educational authorities as to the completion of various grades in school for a number of purposes, and I should not think it would be difficult to establish a procedure under which one would be given a certificate of completion of six grades that could be useful and satisfactory for the purposes of this legislation.

Mr. CREECH. There would be no question as far as you are concerned with regard to whether a school is accredited or not accredited, inasmuch as this bill, I believe, does not provide for accredited schools where one of the others does?

Senator CASE. S. 480 does specifically refer to six grades of education in a State-accredited school, so that that is taken care of by this legislation.

And the majority and minority leaders' bill has the same, I think, substantive provision in regard to accreditation.

Mr. CREECH. Now, sir, I would like to ask you, then, with regard to accreditation, who is to accredit the school? These are to be State-accredited schools? The State is to decide which schools are accredited?

Senator CASE. If this matter should be brought into controversy by the refusal of an election board, for example, or someone else to accept the proof offered of compliance with the terms of the bill by an individual seeking to register or to vote, then the matter would have to be determined by a court as to whether accreditation existed or not.

This is a commonly accepted standard of accreditation.

I know of no State that does not have a provision in its public school laws, a provision for what satisfies those laws, and there are recent legislative actions that I may not be fully familiar with which may cast upon this in certain States. If a State, for instance, should destroy its public school system temporarily or for any particular purpose, it might be difficult under this, but I doubt that it would be permanent.

Mr. CREECH. Sir, of course, the criteria of accreditation does differ

with various associations in this country which accredit high schools, junior colleges, and colleges, and I believe it has been said at one time, for instance, that in one of our States just a few years ago there were only two high schools in the entire State which were accredited by a national rating organization.

Now, if that were the case, I would surmise that it might be the case with grammar schools. So would not this provision also be a very nebulous one, one that it might be very difficult to understand and to endorse?

Senator CASE. I do not think so.

The accreditation which you have just been referring to is accreditation not by a State or by the District of Columbia, but by, presumably, an association of schools or a similar body, an education association or whatnot.

But they are not official bodies except insofar as in some cases, I expect, in statutes and for some purposes referred to in statutes, their accreditation may be of importance.

But that is not the kind of accreditation referred to here. This is State action.

Mr. CREECH. Sir, would this, then, also be applicable to so-called progressive schools where students are promoted automatically each year in the lower grades, since the failure to be promoted may have adverse psychological effects upon them?

In other words, if a student has completed 6 years of school in such a school as that, I presume on the basis of this bill he would be qualified for meeting the literacy requirements?

Senator CASE. If that school or any school is accepted by a State or by the District as meeting its compulsory education laws, the requirements of those laws, then the answer, I think, is yes.

It is up to the State to decide whether this is satisfactory.

Senator ERVIN. Is it not a fact that in many States they promote a child who cannot learn from one grade to another, in order to keep from having 12- to 15-year-old children in the first grade?

Senator CASE. Mr. Chairman, you are talking about what may happen?

Senator ERVIN. No, I am talking about what has actually happened.

Senator CASE. Or what may happen as a practical matter in some cases?

Senator ERVIN. Yes.

Senator CASE. I can envision somebody being promoted for a grade or two for this purpose, but I cannot imagine them progressively getting up to this standard.

Senator ERVIN. Most of the States have compulsory school attendance laws, and children have to go to school, and I am informed that in many areas that it is customary to promote a person, whether he learns anything at all, from the first grade and second grade on up because they do not want a person who is 14 or 15 or 18 years of age sitting down in a class with children that are 7, 8, 9 or 10 years old.

And, yet, under this bill a State would be compelled to allow those people to vote, provided they are 21 years of age, even though they could not read anything or understand anything.

Senator CASE. Mr. Chairman, if this is a widespread practice, then it constitutes a very grave accusation against our school system.

I think that it undoubtedly happens in some case in a difficult individual situation, but that it happens broadly, I would question, and, of course, the remedy for this is what I know occurs in many schools in my States: The establishment of special classes and special teachers to deal with these individuals who are problem kids, for a number of reasons sometimes, perhaps most times, not because of situations within their control.

Senator ERVIN. This would also apply to schools accredited by States to teach the mentally retarded, would it not?

Senator CASE. It seems to me that reference to the sixth grade in a school accredited by any State and by the District, is meant to apply to the regular school system and that if there are such things as grades in schools for mentally retarded which do not relate to the standards which the ordinary school system uses, they should not be applicable. If language to make this clear is necessary, then, undoubtedly, the committee will want to suggest such language.

Mr. CREECH. So it is your feeling, sir, that students in the schools, for instance, which are maintained by the State of Virginia for the mentally retarded and do provide classes past the sixth grade, I believe, who had completed six grades would not necessarily qualify under this bill?

Senator CASE. If they do establish different standards for grades in those schools from the standards generally applicable to public schools, then some provision for that perhaps should be made.

Mr. CREECH. Sir, if Congress may legislate relative to a State election with regard to the literacy requirement within a State, may it not logically be assumed that it also has the power to legislate with respect to age requirements and residence requirements?

Senator CASE. I do not think so.

I do not think, really, that that follows at all, unless there is an abuse of such requirements of a nature that does not occur to me right now, that would require in some fashion establishing the nature of proof of satisfaction of those requirements, which is what this bill is really doing.

This is not fixing the qualification.

This is establishing the nature of proof necessary to meet a qualification, which, admittedly, the State has a right to set. If, in the hypothetical case you posed, it is possible to imagine a similar abuse in the use of other types of qualifications, we might have to consider it.

But certainly, this is no precedent for depriving the States of the right to set qualifications under the Constitution or for the Federal Government to step in and set qualifications on its own.

Mr. CREECH. Sir, is not the age requirement and the residence requirement, as the literacy requirement, a requirement of qualification for voters within the State?

Senator CASE. Yes, and the question that we are dealing with is not the establishment of requirements but of the kind of proof that would be deemed a reasonable satisfaction of requirements.

And, of course, the nature of the requirement of residence, the nature of a requirement of age is quite different from that requiring a judgment and all the rest, which is involved in a literacy test.

Senator ERVIN. If I may interrupt, Senator, I cannot see anything in these bills establishing the rule of evidence.

They establish a substantive rule of law, which says that you cannot prescribe an arbitrary or unreasonable test, and they declare as a matter of law that a test is arbitrary or unreasonable, that any test is arbitrary and unreasonable, and, therefore, illegal, null, and void, if it requires more than completion of six grades of school. There is nothing about a rule of evidence there.

That is a rule of substantive law.

Senator CASE. Looking through the formal words, Mr. Chairman, I respectfully submit that what we are establishing, in substance, is a conclusive presumption that a person who has completed the six primary grades of school accredited by any State or by the District of Columbia meets any reasonable requirement that the State may fix as to—

Senator ERVIN. Assuming that, do you not know that the Supreme Court of the United States has held in a number of cases that an act which establishes a conclusive presumption is unconstitutional in that it forbids the exercise of an indestructible judicial power?

In other words, you establish a conclusive presumption which cannot be contradicted; and you deny an election official the right to show the truth because the conclusive presumption says there is no proof on this point; that this is the end of it.

Senator CASE. I think, with all respect, Mr. Chairman, that we are getting into a discussion about words rather than about substance.

Senator ERVIN. I do not think so.

Senator CASE. As I said, with all respect, it does seem so to me.

And you can state this in various ways. You can say that this is a limitation upon the power of the States to make requirements, to set qualifications, if you want to, in this particular case and in this fashion.

Senator ERVIN. Is that not what it is? That is all it is; whether you do it by conclusive presumption or an act of substantive law, this is an attempt to put a limitation on the power of the States to prescribe a qualification in the form of a literacy test.

Senator CASE. Of course, it is what it is.

Senator ERVIN. Is that not what it is?

Senator CASE. I think we understand what it is in fact, and if you want to describe it as a limitation of the power of the State to impose tests of literacy, comprehension, and the rest of these words, then you may say that it is that, and I cannot quarrel with the plain words of the bill.

Senator ERVIN. That is what I think it is, and I think that it differs from the requirements of article 1, section 2, of the Constitution.

Senator CASE. Of course, I differ with you on this.

Senator ERVIN. Now, as to the word "unreasonable"—Congress is going to establish that an act is unreasonable even though it complies with the Constitution. That question was before the Supreme Court in the case of *Pope against Williams*, reported at 193 U.S. 663, where there was challenged a statute relating to suffrage in the State of Maryland, on the ground it was unreasonable, and here is what the Court said in upholding the statute:

The question is whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one.

And that is exactly what this bill is trying to do: To make it a Federal one, on the theory that it is unreasonable.

Senator CASE. Mr. Chairman, I cannot, I think, consider this question, including the constitutional part of it, in vacuo.

I think you have to consider it in the light of the circumstances and the justification, the factual justification, which those of us who support this legislation feel makes it necessary.

And I think that you would be perhaps justified, if this were something come out of the blue without any history of discrimination based upon the use of literacy tests. You might have another result constitutionally and in the courts, but that is not the situation here, and the facts in the record clearly demonstrate that time after time in large areas of the country literacy tests and similar tests have been used to discriminate against individuals and their right to vote because of their race, creed or color.

And I think, against that background, the constitutionality of this is firm and solid.

Senator ERVIN. Well, does not the Senator agree with me that the question whether a person or an official has violated a constitutional provision is a judicial question?

Senator CASE. Well, certainly, you can never take from the court the right to pass upon a question. This legislation would not do that.

Perhaps I interrupted you, Senator—I am sorry.

Senator ERVIN. That is all right. I was just going to say I think that any controversy which involves an interpretation of the meaning or the application of a provision of the Constitution of the United States presents a judicial question, which is a question to be decided by courts, and not by a legislative body such as Congress. And yet this bill issues a blanket condemnation of many State laws and apparently says you are not even going to be allowed to offer evidence to disprove a declaration as to a matter of fact involving the interpretation of the Constitution.

Is that not what this bill does?

Senator CASE. This bill says first that a citizen shall be allowed to vote without distinction of race, color or previous condition of servitude, and secondly, without subjection to any arbitrary or unreasonable test, standard or practice with respect to literacy. That is one part of it. And the courts have jurisdiction, of course, to consider questions arising under this language.

It goes on to say that—and this is why I think I am right in describing it as an evidentiary matter—that

“arbitrary or unreasonable test, standard, or practices with respect to literacy” shall mean any requirement * * *

other than completion of the sixth grade in a school accredited by any State or the District of Columbia, except of course in the case of citizens judged incompetent.

Senator ERVIN. Perhaps I can illustrate it this way.

This preamble contains a declaration to the effect that the tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color.

Now, let us assume that a State registrar refuses to register a man on the grounds he cannot read and write, as the constitution of North Carolina prescribes; and let us assume as a matter of fact that the man cannot read and write, although he has completed the sixth grade.

Now, would this bill prevent the election official under those circumstances from proving as a matter of fact that the man could not read or write as provided by the literacy test of the State, even though he had completed the sixth grade?

Senator CASE. It seems to me that that is a fair interpretation of the language here, and I think it is the intent. If in a particular case, because of circumstances that certainly reflect no credit upon any educational system in any State, which I do not agree exists, that someone who completed the sixth grade, would not in fact be able to read and write. I think I would be quite frank to say that while this might be unfortunate in that particular case, the need for this bill is so great that the way to get at that unfortunate circumstance is to correct the State school system and its operation in respect of individuals of that sort.

Senator ERVIN. Well, let me ask you how widespread this is. I will enumerate the States that have a literacy test.

First there is Alaska. Second, Arizona. Third, California. Fourth, Connecticut. Fifth, Delaware. Sixth, Hawaii. Seventh, Maine. Eighth, Massachusetts. Ninth, New Hampshire. Tenth, New York. Eleventh, Oklahoma. Twelfth, Oregon. Thirteenth, Washington. Fourteenth, Wyoming. Those 14 States lie outside of the South. Is there any substantial evidence anywhere indicating that the literacy tests of those 14 States have been used to deny or abridge the right of any qualified Negro to vote?

Senator CASE. No, I do not know of evidence of that sort. The record on which we particularly relied here, of course, is the report of the Commission which refers to 8 States, and roughly 100 counties in those States.

Senator ERVIN. Well, there are only seven Southern States that have literacy tests.

Senator CASE. I am sorry, on the question of literacy you are absolutely right. The eight States are the States in which arbitrary denial of the right to vote on a substantial scale has been found by the Commission.

Senator ERVIN. One of those States is North Carolina. North Carolina's literacy test has just been upheld by the Supreme Court of the United States in the *Lassiter* case, and the Supreme Court of the United States said in that case wherever a State adopts a literacy test which is alike to all people, that is perfectly constitutional.

Does the Senator disagree with that being a correct statement?

Senator CASE. Under the present state of the law, of course, I do not disagree. I think that this bill, 480, or even 2979, if it were adopted, then the statement of the Court would be amended to conform to the provision of the statute.

Senator ERVIN. My State of North Carolina being among these Southern States, the Civil Rights Commission says—it quotes the State committee as saying, "The discrimination against potential Negro voters is largely a thing of the past." Now, it does say altogether there have been 40 voting complaints registered in North Caro-

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lina. There are 1,116,000 Negroes residing in North Carolina, and 40 voting complaints have been filed by them.

Would the Senator from New Jersey take the position that those facts standing alone would be sufficient to justify taking away from the registrars in 2,200 precincts, and from the State of North Carolina, the right to prescribe a literacy test of its own in the form which has been sustained by the Supreme Court?

Senator CASE. Were the general situation in the country like that which pertains in North Carolina, as found by the Commission, we would have a quite different situation from the situation which we do face, Mr. Chairman.

Senator ERVIN. Now, the Civil Rights Commission has reported, according to Senator Javits, that there are 100 counties in the country in which there have been discrimination against Negroes. But all those are not on the basis of literacy tests, but on every other basis also. There are, according to the information given me by the Library of Congress, 3,071 counties in the 50 States.

Does the Senator take the position of the fact that there are violations of right to register to vote in 100 out of 3,071 counties is a sufficient basis to justify changing the entire election system of the United States?

Senator CASE. Mr. Chairman, I think that the situation is so serious, as shown by the Commission's report, that this bill is completely justified. In fact, we would be doing less than our duty if we did not take the action which the bill would have us take.

Senator ERVIN. Now, I would like to ask the Senator this question.

The only operative part of S. 480 is subsection 2 on page 3, is it not?

Senator CASE. That is the section which amends section 2004, subsection (a) of the revised statutes—that is right—the part of the bill which comes before that consists of findings.

Senator ERVIN. Now, I would like to ask the Senator if there is any language in section 2 that limits the operation of the law to cases of persons denied the right to vote on account of race or color or previous condition of servitude.

Senator CASE. Well, there are several parts of it. Of course, there is a specific provision that people—all citizens otherwise qualified shall be allowed to vote without distinction of race, color, or previous condition of servitude, and without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy. And then the language—the effect of the whole thing is the provision that we have under discussion—the completion of the sixth grade in a school accredited by any State or by the District shall satisfy such test.

Senator ERVIN. Well, would not the Senator agree with me that a State registrar would violate section 2 if he refused to register a man who had completed the sixth grade in school and there was nothing whatever in the action of the registrar—that it was totally uninfluenced by the man's race or color.

Senator CASE. Well, specifically and even more sharply, Mr. Chairman, suppose he refused on the ground of a literacy test or requirement the right of a white citizen to vote. He would be violating that law.

Senator ERVIN. My point is suppose that the registrar is not influenced to the slightest degree in his ruling by the man's race or color,

but he turns him down solely on the ground that he cannot read and write according to the State test, although he has completed the sixth grade in school. In other words—

Senator CASE. He would violate this law.

Senator ERVIN. That is what I say. So irrespective of the fact his ruling was not based at all on the man's race or color—

Senator CASE. That is right. And I think this is absolutely necessary, because—for two reasons—the difficulty of proof as to the subjective state of mind of the registrar is one, and the other is the fact that discrimination has been practiced on a broad scale.

Senator ERVIN. Now, under this bill, if a State, or the election official of a State said, "We have never used a literacy test to deny or abridge the right of any man to vote on account of his race or color or previous condition of servitude"—would that State be permitted to establish that fact in evidence in any litigation on this subject?

Senator CASE. Conceivably, in the initial test of the constitutionality of this statute, assuming it becomes one, evidence of that sort might be received—although this, as the chairman knows, is one of these very difficult questions of evidence that I think still has not been satisfactorily and completely worked out, as to how you get material of this sort before the court. But I think only for such a purpose would such evidence be admissible. And I think it likely that in order to give a State at least one chance for a complete challenge of the constitutionality of this statute, it might be admitted.

Senator ERVIN. Well, then, the decision would be admitted in the case of 1 State, but the other 20 States that have literacy tests, will they be denied that same right?

Senator CASE. Well, I am assuming as a result of a test, in which every possible shred of evidence on all matter is submitted, either in evidence or in the form of statements based upon common knowledge or general usage or whatever the wording is—once the constitutionality had been tested, I think it would be upheld, and I think that future cases would not be heard, and the matter would not come up.

Senator ERVIN. Well, it is difficult to reconcile that idea with due process of law under which all litigants stand equal before the law. I would have some difficulty saying one party could raise the question and another could not raise the same question.

Senator CASE. Well, I am not saying you could not raise it. You could try a dozen times to test the constitutionality of a statute. In every attempt, I suppose, evidence might be attempted of the sort that the chairman suggests. But after the thing had been decided once by the Supreme Court, and properly so, that other people attempting to test it on the same grounds would receive rather quick treatment.

Senator ERVIN. Well, is not that position fundamentally based on the fact that it is a matter of law rather than a recitation of fact?

Senator CASE. Well, the law, the constitutionality of the operative provisions in the bill do rest, I surely agree, on the findings of fact, and importantly so. That is why they are included. That is why we are having hearings.

Senator ERVIN. Do you think that Congress can expand its power to legislate and contract the power of the State to legislate by making assertions of fact in a preamble or a whereas?

Senator CASE. Well, it is not a question of contracting the power of the States or expanding the powers of Congress. Congress, under the Constitution and the amendments to it, has always had the power and the obligation to act in an area such as this, where the States have—I think we have factual proof that they have—through their agents deprived people of constitutional rights. So we are not expanding the powers of Congress; we are just exercising them. We are not contracting the powers of the States; we are preventing the States from doing unlawful actions in derogation of the rights of citizens.

Senator ERVIN. And are denying to the States the right to prove that they are not engaged in such action.

Senator CASE. Well, it is necessary to pass general laws in order to make society work and establish the rights of citizens effectively. Where that is necessary, on the basis of a factual history, such as the one we have here, it may be unfortunate, but nevertheless it is necessary.

Senator ERVIN. Well, do you agree with the proposition that Congress would have no power whatever to pass the legislation embodied in the bill 480, if there was no denial or abridgement of the right of persons to vote in States on account of race or color?

Senator CASE. I would myself not want to vote for such a statute. And if there were no need for it, I think it would not even be proposed. Even its constitutionality, I said earlier, does depend upon the showing, which I think has been clearly made, of the need for such legislation.

Senator ERVIN. But you take the sins and inequities of some people and visit them upon all the people by this declaration. Because of 100 counties that may have offended, you deny over 3,000 others the rights they have enjoyed under the Constitution of the United States and under State laws from the time George Washington was inaugurated as President down to this moment—is that not so?

Senator CASE. I think I would say this—and I think this would be perhaps a fair way to say it.

We do not have before us evidence in all this time these rights have been abused by the majority of the States, or these powers by the majority of the States, and therefore there has not been occasion in respect of them to pass legislation of this nature. I do not think they will find onerous the provisions, the States which have not abused this—I do not think they will find these provisions onerous in any respect. My own experience is that I have not heard any objection from any State other than those in the South.

Senator ERVIN. So the bill is aimed at the South.

Senator CASE. Mr. Chairman, not in an invidious way. It is aimed—it is so difficult to talk about this in a way that conveys your exact meaning. If you say you want to help the South, you sound patronizing, and goodness knows I do not want to patronize anybody. But I think the legislation is necessary here, because of the evidence that has come from this Commission's study, based upon these States in question.

Senator ERVIN. Well, this Commission has brought forth some wonderful and strange things. For instance, I read this study and I found them insinuating that the Government was somehow responsible for this, because they said some people had to live in secondhand

houses. This was embodied in the report the Commission made to the President, who lives in a secondhand White House, and a Congress which legislates in a secondhand Capitol. So as a result of that, I do not take the same opinion about the wisdom of the Civil Rights Commission.

Senator CASE. After a house has become a secondhand house and a thirdhand and a fourthhand house, then it comes to have an antique value, which is not exactly what we are talking about, or what the Commission meant.

Senator ERVIN. Section 2 of article I, the 17th amendment, says that the only people legally capable of voting in any State in elections for Senators and Representatives are those, and I quote, "who have the qualifications requisite for electors of the most numerous branch of the State legislature."

Now, is not that a statement in about as simple words as can be used, that the only people who have the right to vote for Senators and Congressmen are those who are eligible to vote under State law for members of the most numerous branch of the State legislature?

Senator CASE. I think it is a very clear statement. It has to be read, of course, as a part of the full Constitution, which contains other provisions.

Senator ERVIN. That is true. And two of the chief other provisions are the 15th and 19th amendments, are they not?

Senator CASE. That is certainly one of them.

Senator ERVIN. There is nothing in the 14th amendment that would invalidate any State law which applied alike to all people in like circumstances, would it?

Senator CASE. Which in its actual application and operation so apply it. I think that is true. But that includes the manner in which it is used, and therefore we get right back to the question of whether this is constitutional on the basis—

Senator ERVIN. Well, is it not a distinction between State legislation and State action? In other words, if a State law, by its phraseology, applies alike to all people in like circumstances, the law itself does not offend the Constitution, or the 14th amendment.

Senator CASE. Well, the law itself and the manner of its enforcement or lack of enforcement I think has to be taken together in considering whether remedial action by the Congress is justified in regard to a particular State's action.

Senator ERVIN. I do not quarrel with that at all. I will ask the Senator—I do not know whether the Senator has studied these literacy tests in the various States—but I will ask the Senator if he does not know that every one of the literacy tests prescribed by the laws of the 21 States having such tests comply strictly, as far as the phraseology of the law is concerned, to the second section of the first article of the Constitution.

Senator CASE. Mr. Chairman, I do not question your statement. I have not made that kind of comparison recently enough to add my own statement in support of it. But you can have exactly the same language in one constitution and in another constitution. The constitution, for example, of any State other than the United States of America, and many of them are in similar terms. The actual meaning and effect, the right of a citizen, his safety and the safety of his

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property, are very different in those States which have the exact same language in their constitution as we do.

Senator ERVIN. Yes. That is a distinction of State legislation, and action of State officials under the legislation.

Senator CASE. Yes. And I think they have to be taken together in order to determine even whether, for the constitutional purposes, whether a particular State statute or constitutional provision is in fact—

Senator ERVIN. In other words, is the Senator saying that we have to deprive States of the powers which the Supreme Court has held they possess under the Constitution because of the violation of those State laws by some election officials?

Senator CASE. Well, you cannot answer that in general terms. We are dealing here with very concrete situations. In this situation, I can only repeat that I think the action proposed is justified, because I think that it is a necessary and reasonable way of getting at an abuse by the State of the rights of citizens. I think you can hardly say more than that.

Senator ERVIN. I think the Senator agrees with me that under the second section of article I, the 17th amendment, that the only persons eligible to vote for Senators and Congressmen are those persons who are eligible to vote under State law for members of the most numerous branch of the State legislature. Now, here is what is said, and the latest thing I can find on the subject about the effect of the 15th and 19th amendments.

The 15th and 19th amendments granted no new voting rights except that of not being discriminated against on the grounds of race, color, previous condition of servitude, or sex.

Does the Senator think that is a fair interpretation of those two amendments?

Senator CASE. The chairman has certainly made a correct verbal statement of those two provisions of the Constitution.

Senator ERVIN. Now, I think that 480—and I am not going to ask you many more questions, because I did not intend to ask you this many.

Senator CASE. Frankly, my only embarrassment is I have taken so much of the chairman's time.

Senator ERVIN. Well, I think that all of these bills, and particularly 480, undertake, as I construe it, to legislate in respect to all elections. That is, elections for Federal officials, elections for State officials, and elections for municipal officials.

Senator CASE. Yes, I agree.

Senator ERVIN. And it can only be based on the 14th or the 15th amendment.

Now, in the *Civil Rights* cases which were handed down in 1883, reported in 109 U.S., page 3, it says this, dealing with the 14th amendment—and it points out that the amendment prohibited State action—that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person, without due process of law, or deny to any person within its jurisdiction the equal protection of laws. And then the Court points out, in the last clause of that amendment, the provision that Congress shall have the right and the power to enforce this article by appropriate legislation.

But they say in this case to enforce what? To enforce the prohibition by adopting appropriate legislation for correcting the effects of such prohibited State laws and State actions, and thus to render them, in effect, null, void, and innocuous. This is the legislative power conferred upon the Congress, and this is the whole of it. It does not invest Congress with the power to legislate upon subjects which are within the domain of State legislation, but it provides modes of relief against State legislation or State action of the kind referred to.

Now, all of these bills—I mean the bills based on the 14th and 15th amendments—clearly offend that language, because subsection 2, article I of the Constitution, the power to prescribe the qualifications of voters who elect Congressmen, and under the 17th amendment, the power to prescribe the qualifications of the voters there—that is, the voters for Senators—is within the domain of State legislation, because the States alone can prescribe the qualifications of those who are eligible to vote for members of the most numerous branch of their legislature.

So here is a bill that unconstitutionally invades the domain of the State, and undertakes to establish as affirmative legislation a Federal standard to supersede the State standards. This has been held in a multitude of cases on the 14th amendment, such as the *Civil Rights* cases. But you have the same situation in the 15th, because there the amendment is a prohibition upon State action.

Here is what the Court says on that amendment :

The 15th amendment is, therefore, a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article. First, legislation authorized by the amendment must be addressed to State action in some form or through some agency. Second, it must be limited to dealing with discrimination on account of race, color, or condition.

Now, this bill S. 480 is not limited to dealing with discrimination on account of race, color, or condition, but it is limited to dealing with literacy tests. Therefore, I just do not see, if the Constitution means what it says, and what it has always been interpreted to mean, how the bill could possibly be sustained.

Senator CASE. Well, Mr. Chairman, I have deep respect for the chairman's ability as a lawyer, for his scholarship, for his integrity, and for his fairness. I understand exactly how he feels. I happen to have a very strong contrary view. I think that this bill and the procedure set up in it is reasonably related to correction of an abuse by the States of these literacy tests, and therefore it is not only constitutional, and not only justified, but it is necessary if we as a Congress are to perform our duties under the Constitution.

I suppose you and I might stay here for a long, long time, and neither would persuade the other that he was right.

Senator ERVIN. Yes, sir. I apologize for taking so long. I did not intend to.

Senator CASE. It is a privilege always to have any sort of intercourse with the Chairman, and stimulating as well.

Senator ERVIN. Thank you.

Mr. CREECH. The next witness, Mr. Chairman, is the Honorable Herman E. Talmadge, U.S. Senator from Georgia.

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STATEMENT OF HON. HERMAN E. TALMADGE, U.S. SENATOR FROM THE STATE OF GEORGIA

Senator TALMADGE. Mr. Chairman, I appreciate the opportunity of appearing before this subcommittee to testify in opposition to the two proposed bills which relate to voter qualifications—specifically, S. 480 and S. 2750.

Although my remarks will be equally applicable to both proposals, and other similar proposals, I will confine my remarks primarily to S. 2750.

At this point, Mr. Chairman, I ask unanimous consent that the statement be inserted in full in the record.

Senator ERVIN. That will be done.

Senator TALMADGE. In order to save the time of the subcommittee, I will highlight the statement.

Simply stated, Mr. Chairman, the proposed legislation which this subcommittee has been called upon to consider would provide that a sixth grade education shall be the only literacy test for voters in presidential and congressional elections. It would, by statute, take for the Federal Government the responsibility of determining voters qualifications; a matter which, by the Constitution, has been left exclusively to the individual States.

I submit that Congress is without constitutional power to prescribe qualifications for electors.

In the plainest language possible, article 1, section 2 declares that electors for Members of the House of Representatives—

shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

When the method of selecting Senators was changed from election by the State legislatures to election by the people in the 17th amendment, section 1 thereof adopted language identical to article I, for it was provided—

The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

That, Mr. Chairman, is the only language that I know of in the Constitution that is repeated in two separate places in identically the same words.

The effect of this language is clearly stated in Willoughby, "The Constitutional Law of the United States," pages 540-541:

A distinction is to be made between the right to vote for a Representative to Congress and the conditions upon which that right is granted * * * the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the State legislature. The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several State legislatures. * * *

Similarly, in Matthews, "The American Constitutional System," second edition, page 363, 1940, the language is approximately the same.

In the debates which took place in the constitutional conventions held in the original States for the purpose of ratifying the Constitu-

tion, it was pointed out that since elections for Congressmen would likely be held at the same time and as a part of elections for State officers, a hard and disagreeable situation would arise; an elector could vote for State officers, but would be held ineligible to vote for Congressman—a situation which would possibly arise had the Constitution sought to prescribe uniform qualifications or to authorize Congress to do so. "Five Elliot's Debates," page 385.

There is a wealth of case material which supports this principle including such major Supreme Court cases as, *Newberry v. United States*, 256 U.S. 232, 65 L. Ed. 913 (1921); *Ex Parte Yarbrough*, 110 U.S. 661, 28 L. Ed. 274 (1884); *United States v. Classic*, 313 U.S. 299, 85 L. Ed. 1368 (1941).

In the Yarbrough case, the Court expressly recognized that—

the importance to the General Government of having the actual election, the voting for those members, free from force and fraud is not diminished by the circumstances that the qualifications of the voter is determined by the law of the State where he votes.

This principle has not been overruled, and the question as to qualifications for electors is not seriously disputed today.

I would call the chairman's attention to the latest word of the U.S. Supreme Court on this subject.

I hold in my hand the case of *Baker, et al., Appellants v. Joe C. Carr, et al.*, which was handed down by the U.S. Supreme Court just yesterday. I read from the special concurring decision of Associate Justice Douglas. Here is the language he uses:

That the States may specify the qualifications for voters is implicit in article 1, section 2, clause 1, which provides that the House of Representatives shall be chosen by the people and that the electors in such State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The same provision contained in the 17th amendment governs the election of Senators. Within limits those qualifications may be fixed by State law.

He recites approvingly *Lussiter v. Northampton Election Board, Ex Parte Yarbrough*, and others.

So the Supreme Court's decision in this matter have been held time after time to support the right of the States to determine their electors.

There are a number of decisions supporting this principle which I have cited in my prepared statement.

Now I want to call the subcommittee's attention to another provision in the Constitution. I refer to article I, section 4, clause 1, which is sometimes cited as authority for expeditions of this type, to strike down State law.

I wholeheartedly disagree with the conclusion that some of these so-called advocates arrive at. I will read the clause in its entirety.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

It would be enough to say that since article I, section 2, makes express reference to qualifications of electors by adopting those applicable to State legislatures, and since the 17th amendment makes similar provision as to Senators, these specific provisions will necessarily control over the more general language of article 1, section 4, even assuming the latter to be otherwise applicable, which as will be hereafter shown, it definitely is not. See 50 Am. Jur. 371, section 367, setting

forth the rule that specific provisions of a document control as against more general ones, which, without the specific, would be included in the general.

Certainly, the reference to "time" and "place" in article I, section 4, has no relevancy here.

With respect to "manner," this word generally has reference to the procedure or the way of doing a thing, and does not define who is qualified to do it. In *re Koelhoff's Estate*, 25A 2d 638, 644, 20 N.J. misc. 139; *State v. Adams*, 2 Stew. 231, 242 (Ala.). There is an Oregon and New York case which has held the same thing.

In *Newberry v. United States*, 256 U.S. 232, 250, 257, 65 L. Ed. 913 (1921) the Court, in speaking of article I, section 4, stated that—

Sundry provisions of the Constitution indicated plainly enough what its framers meant by elections and the "manner of holding" them, following which the Court enumerated a list of provisions, all of which were purely procedural in nature. Reference was made to Hamilton's statement in the *Federalist*, No. 60, to the effect that the qualifications of electors, unlike other matters, could not be altered. In dealing specifically with the language as to "manner of holding," it was said:

Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these."

In the constitutional debates, the discussion relative to article I, section 4, centered principally around the reference to "place and time." (See 3 *Elliot's Debates*, pp. 60, 175, 366, 403-404; *id.*, vol. 2, p. 32.)

Mr. Steele of North Carolina, who was a delegate to the convention, summarized very clearly what it meant, and he stated that that language had no authority whatever to regulate who should vote.

From another standpoint, it is clear that article I, section 4, does not support the validity of S. 2750, insofar as it would illegalize literacy tests. The words "times, places and manner" appear in that sequence. "Times" and "places" are specific in nature, and precede the more general term "manner."

Consequently, under the rule of interpretation known as *ejusdem generis* the meaning of "manner" is restricted by "times" and "places." 50 Am. Jur. 244 Sec. 249. As stated in *Cutler v. Kouns*, 110 U.S. 720, 728, 28 L. Ed. 305 (1884):

The rule of interpretation correctly stated is, that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified.

See also *United States v. Salen*, 235 U.S. 237, 59 L. Ed. 210 (1914); and *Cleveland v. United States*, 329 U.S. 14, 18, 91 L. Ed. 12 (1946).

Now, Mr. Chairman, sometimes these advocates for such proposed legislation reference the 14th and 15th amendments of the Constitution of the United States. Let us examine the appropriate provisions of these two amendments.

Section 5 of the 14th amendment, and section 2 of the 15th amendment, authorize Congress to enforce those amendments by "appropriate legislation."

Under these amendments, Congress is limited to legislating against State action discriminatory in nature. *Civil Rights* cases, 109 U.S. 3, 13, 27 L. Ed. 835 (1883); *Lackey v. United States*, 107 F. 114 (C.C. Ky. 1901), cert. den. 181 U.S. 621; *United States v. Cruikshank*, 92

U.S. 542, 23 L. Ed. 588, 592 (1876). In this respect, it is important to recall that Congress' power under the 14th and 15th amendments is in a sense more restricted than its power to legislate as to the "manner" of Federal elections under article I, section 4. Under the latter, if the subject matter is legitimately concerned with the "manner" or conduct of the election process itself, Congress can legislate even as against private individuals, *United States v. Classic*, 313 U.S. 299, 315, 85 L. Ed. 1368 (1941), and such legislation is not limited to proscribing discrimination. *United States v. Mumford*, 16 F. 223 (C.C. Va. 1883); *United States v. Foote*, 42 F. Supp. 717 (D.C. Del. 1942). Under the 14th amendment, however, Congress can legislate only so as to prevent discrimination, and under the 15th amendment, only as against discrimination based upon race or previous condition of servitude. *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563 (1876).

Applying these principles, it necessarily follows that any effort by Congress to outlaw literacy tests cannot be predicated upon either of these two amendments. Literacy tests uniformly have been upheld as against claims that they constituted discrimination. *Williams v. Mississippi*, 170 U.S. 213, 42 L. Ed. 1012 (1898); *Trudeau v. Barnes*, 65 F. 2d 563 (C.C. 5th 1933); *Darby v. Daniel*, 168 F. Supp. 170 (D.C. Miss. 1958); *Williams v. McCulley*, 128 F. Supp. 897 (D.C. La. 1955); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 3 L. Ed. 2d 1072 (1959). That decision was written by Associate Justice Douglas and concurred in by every member of the U.S. Supreme Court.

Therefore, since literacy tests do not constitute discrimination, they cannot be reached under either the 14th or 15th amendments.

Moreover, the proposition goes even further here. To uphold S. 2750 in this regard would require a holding that the general reference in these two amendments is sufficient authority for Congress to supersede the specific language of article I, section 2, remitting all questions of qualifications to State law, and that such authority is also paramount to similar, specific language adopted subsequent thereto in the 17th amendment. In other words, the Government necessarily must contend that despite the rule that the latest expression of the law-making body controls, the plain language of the 17th amendment cannot be given effect because of the enforcement clauses of the earlier 14th and 15th amendments.

Mr. Chairman, I have briefly attempted to point out some of the more important reasons why Congress cannot, by statute, abrogate a State's constitutional right to determine voter qualifications. In this regard it is also interesting to note that in the 1959 report of the U.S. Civil Rights Commission, Commissioners Hannah, Hesburgh, and Johnson recommended adoption of a constitutional amendment which would outlaw use of literacy tests. (See report, p. 143; 4 Race Rel. L. R. 791 (1959).) It is significant that even such partisans who obviously favor abolition of literacy tests believe that a constitutional amendment will be required to accomplish it. Commissioners Storey and Carlton, who opposed the proposal, agreed in this respect that a constitutional amendment was the only appropriate way to do it.

Mr. Chairman, I further submit that even if Congress possessed the power to legislate in this field such legislation is completely unnecessary and unwise.

As was demonstrated in the case of *Davis v. Schnell*, 81 F. Supp. 872 (D.C. Ala. 1949), a literacy test which is so vague on its face as to invite discrimination will be declared unconstitutional under the self-executing features of the 14th amendment's due process clause, and Federal legislation can add nothing to what the law already provides.

Similarly, if a literacy test is administered unfairly, such conduct can be enjoined under existing law. Such follows from section 1971, 42 USCA, in its present form. The aggrieved citizen does not even have to employ attorneys and bring his own case. The Attorney General will bring it for him at the expense of the United States. (42 USCA 1971(c), as amended 71 Stat. 637 (1957)). If a "pattern or practice" of discrimination is shown, the Federal courts are authorized to appoint voting referees to supervise registration and voting, thereby making administrative discrimination impossible.

As it presently reads, section 1971 is sufficient to deal with all conduct which Congress is authorized or should be authorized by the Constitution to regulate, at least in the present context.

Senator ERVIN. While the Senator is on that point, would it be all right to interrupt him?

Senator TALMADGE. Indeed it will.

Senator ERVIN. Now, the amendment made in 1960 to the Civil Rights Act of 1957, is clearly based upon the 14th amendment, is it not?

Senator TALMADGE. It is; yes, sir.

Senator ERVIN. And it has a provision to the effect that first, cases brought under that amendment or under the Civil Rights Act of 1957 are of an equitable nature and are triable by Federal district judges without juries, are they not?

Senator TALMADGE. That is correct.

Senator ERVIN. And the 1960 amendment provides that if a judge finds that a qualified Negro has been denied the right to register and vote, on account of his race or color, and that that was done pursuant to a pattern, then the court can appoint voting referees, who are to take the evidence on the question of the man's meeting the literacy test.

Senator TALMADGE. The chairman is eminently correct.

Senator ERVIN. And not only that, the bill even goes so far as to declare that in cases where the voting referees are appointed and they take the test of the person in question, that the only evidence that can be considered by the court when it passes on exceptions to the report of the voting referee is the evidence taken by the voting referee himself.

Senator TALMADGE. The chairman is eminently correct.

Senator ERVIN. And I will ask the Senator from Georgia if, as a matter of fact, if you, provided you left a blank space in the complaint, so that you could adapt a suit to the names of the plaintiffs and the names of the defendants, and the venue of the case, could bring virtually every one of these cases using a printed complaint, could you not?

Senator TALMADGE. The chairman is correct, sir.

Senator ERVIN. And the Department of Justice could turn out those printed complaints at the rate of 100 or 150 or if necessary 500 a day, could they not?

Senator TALMADGE. They could, indeed.

Senator ERVIN. Then the Federal judge sitting without a jury, or the voting referee, would not have to take more than 2 or 3 minutes, when the case came on for trial, to sit beside the applicant and let the applicant read a section out of the Constitution and write a section out of the Constitution. As far as the trial on the literacy test point is concerned, it probably would not take more than 2 or 3 minutes, is that not true?

Senator TALMADGE. I agree entirely with the chairman.

Senator ERVIN. Is not all of this talk about there being something cumbersome about enforcing the rights of persons wrongfully denied the right to vote under a literacy test, is that not so much nonsense?

Senator TALMADGE. Of course it is.

Mr. CHAIRMAN. S. 2750 is even more objectionable in another respect. The language relating to tests is not limited to matters of literacy. Section 1971(b), as amended, states that—

Deprivation of the right to vote shall include * * * the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise * * *

Under this broad language, convicted felons could be enfranchised. Suppose, for example, that a State requires a registrant to complete a questionnaire as to such matters as age, residence, and character. If the registrant completes this form and discloses a conviction for a serious offense, could it be said that his denial of suffrage was deprived from his "performance in any examination"? It is not entirely clear that such a result would not be impossible under S. 2750.

Moreover, the same reasons which inspired the Constitutional Convention to adopt the voter qualifications of State law (art. I, sec. 2) weigh equally heavy today, and indeed, more so.

Elections for Members of Congress are almost always held at the same time and as a part of State elections at which State and local officers are elected. The effect of S. 2750 is to prescribe different qualifications for electors for Congressman and Senator than those prescribed by State law for State officers.

This will necessitate separate registers, separate ballots, separate voting machines, and may ultimately necessitate separate elections. Absentee voting will also be complicated.

Lastly, in view of the large number of Federal statutes now protecting the right to vote, it is submitted that additional legislation on the subject is not needed. In an appendix, the various statutes, both criminal and civil, affording protection against interference with the right to vote are enumerated and I ask that this be made a part of the record. I would point out that there are 15 different statutes that have been adopted by the Congress of the United States protecting the right to vote. Nine of them are civil in nature, and six of them are criminal. If 15 statutes adopted by Congress on this one issue would not protect the right to vote, I do not know what will.

Senator ERVIN. That will be inserted in the record.

Senator TALMADGE. Under recent amendments to 42 U.S.C.A. 1971, revolutionary, far-reaching provisions are made in the field of voting rights. Suits by the Attorney General on behalf of private persons are authorized. The courts are empowered to issue orders declaring cer-

tain persons qualified to vote, and to appoint voting referees to supervise election procedures.

Under section 1974, voting records must be preserved, and made subject to inspection.

The Civil Rights Commission, armed with unheard-of investigatory procedures as a result of the decision in *Larche v. Hannah* (363 U.S. 420, 4 I. Ed. 2d 1307 (1960)), is given a roving commission to conduct investigations and issue compulsory process to harass, accuse and try State election officials.

This is and should be enough. Merely because isolated cases of abuse occasionally arise, necessitating litigation, is no reason to abrogate the Constitution.

When a crime is committed, no one would suggest that we dispense with constitutional principles simply because the crime is shocking, brutal, or one too frequently committed.

These proposals stand on no better footing, and I hope this subcommittee will disprove them.

(The full statement of Senator Talmadge and the appendix referred to follow:)

PREPARED STATEMENT OF U.S. SENATOR HERMAN E. TALMADGE

Mr. Chairman, I appreciate the opportunity of appearing before this subcommittee today to testify in opposition to the two proposed bills which relate to voter qualification laws, S. 480 and S. 2750. Although my remarks will be equally applicable to both proposals, I will confine my statement primarily to S. 2750.

Simply stated, Mr. Chairman, the proposed legislation which this subcommittee has been called upon to consider would provide that a sixth grade education shall be the only literacy test for voters in presidential and congressional elections. It would, by statute, take for the Federal Government the responsibility of determining voter qualifications; a matter which, by the Constitution, has been left exclusively to the individual States.

I submit that Congress is without constitutional power to prescribe qualifications for electors.

In the plainest language possible, article I, section 2 declares that electors for Members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

When the method of selecting Senators was changed from election by the State legislatures to election by the people in the 17th amendment, section 1 thereof adopted language identical to article I, for it was provided: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The effect of this language is clearly stated in Willoughby, *The Constitutional Law of the United States*, pages 540-541:

"A distinction is to be made between the right to vote for a Representative to Congress and the conditions upon which that right is granted * * * the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the State legislature. *The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several State legislatures* * * *." [Emphasis supplied.]

Similarly, in Mathews, *The American Constitutional System*, 2d edition, page 303 (1940), it is said:

"Two provisions of the Constitution other than section 2, article I, and the 17th amendment indirectly leave to the States powers over voting qualifications. The first is section 1 of article II which grants to the States the right to choose the manner of appointing presidential electors. If elections are designated as the manner of appointing electors, the States have authority to determine what shall be the qualifications of voters in these elections. The second provision is the

second section of the 14th amendment. "This section of the amendment clearly recognizes the right of a State to adopt suffrage qualifications which exclude certain of its adult male citizens from voting." By this section the State is penalized for denying the right to vote to male citizens of 21 years of age for reasons other than participation in rebellion or other crimes; but the right to deny the suffrage, meaning ordinarily the right to establish qualifications restricting the right to vote, is legally sanctioned."

In the debates which took place in the constitutional conventions held in the original States for the purpose of ratifying the Constitution, it was pointed out that since elections for Congressmen would likely be held at the same time and as a part of elections for State officers, a hard and disagreeable situation would arise; an elector could vote for State officers, but would be held ineligible to vote for Congressman—a situation which would possibly arise had the Constitution sought to prescribe uniform qualifications or to authorize Congress to do so (5 Elliot's Debates, p. 385).

There is a wealth of case material which supports this principle including such major Supreme Court cases as *Newberry v. United States* (256 U.S. 232, 65 L. Ed. 913 (1921)); *Ex Parte Yarbrough* (110 U.S. 661, 28 L. Ed. 274 (1884)); *United States v. Classic* (313 U.S. 299, 85 L. Ed. 1368 (1941)).

In the *Yarbrough* case, the Court expressly recognized that "the importance to the General Government of having the actual election, the voting for those members, free from force and fraud is not diminished by the circumstance that the qualifications of the voter is determined by the law of the State where he votes."

This principle has not been overruled and the question as to qualifications for electors is not seriously disputed today.

In *Ventre v. Ryder* (176 F. Supp. 90, 94 (D.C. La 1959)), the Court held:

"Under our constitutional system, the qualifications of voters is a matter committed to the States, subject only to Federal constitutional restraints prohibiting discrimination on account of race, color, sex * * *."

"The question of whether or not a voter is a qualified elector is a State matter to be determined by State law and State courts" (p. 97).

In *Tullier v. Giordano* (265 F. 2d 1 (C.A. 5th 1959)), an injunction was sought against a Louisiana registrar, the charge being that he refused to register, by means of the literacy test imposed by State law, all voters not friendly to his political faction. The Court declared:

"Under our Federal system the qualification of voters is left to the several States subject to some limitations imposed by the U.S. Constitution. As originally adopted, the Constitution contained few provisions on the subject of voting rights."

The Court then referred to article I, sections 2 and 4; article II, section 1, and the 12th, 14th, 15th, 17th, and 19th amendments.

In *Darby v. Daniel* (168 F. Suppl. 170 (D.C. Miss. 1958)), in upholding the Mississippi literacy test, it was said:

"Any consideration of the constitutionality of the challenged portions of the amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States" (p. 176).

The question as to presidential electors was settled in *McPherson v. Blacker* (146 U.S. 1, 36 L. Ed. 869 (1892)), which involved mandamus by nominees for presidential elector against the Michigan secretary of state, seeking to have declared unconstitutional a recent Michigan statute governing election of presidential electors. The new statute provided for the election by districts of presidential and vice presidential electors, the plaintiffs contended that the Constitution required the State to act as a unit, and not delegate to subdivisions the right to select electors.

The Court rejected this attack, holding that "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States," referring to article II, section 1, clause 2 (p. 35).

No violation of the 14th or 15th amendments was found, as the right of suffrage was held to be derived from State citizenship (pp. 37-38).

Article I, section 4, clause 1, is cited in the proposed legislation as giving constitutional authority for such legislation. I wholeheartedly disagree with this conclusion.

This clause provides:

"The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

It would be enough to say that since article I, section 2, makes reference to qualifications of electors by adopting those applicable to State legislatures, and since the 17th amendment makes similar provision as to Senators, these specific provisions will necessarily control over the more general language of article I, section 4, even assuming the latter to be otherwise applicable, which, as will be hereafter shown, it definitely is not. See 50th American Jurisprudence, page 371, section 367, setting forth the rule that specific provisions of a document control as against more general ones, which, without the specific, would be included in the general.

Certainly, the reference to "time" and "place" in article I, section 4, has no relevancy here.

With respect to "manner," this word generally has reference to the procedure or the way of doing a thing, and does not define who is qualified to do it. In *re Koelhoff's Estate* (25A 2d 638, 644, 20 N.J. Misc. 139); *State v. Adams* (2 Stew. 231, 242 (Ala.)).

In *Newberry v. United States* (256 U.S. 232, 250, 257, 65 L. Ed. 913 (1921)), the Court, in speaking of article I, section 4, stated that "sundry provisions of the Constitution indicated plainly enough what its framers meant by elections and the 'manner of holding' them, following which the Court enumerated a list of provisions, all of which were purely procedural in nature. Reference was made to Hamilton's statement in *The Federalist*, No. 60, to the effect that the qualifications of electors, unlike other matters, could not be altered. In dealing specifically with the language as to 'manner of holding,' it was said:

"Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these."

In the constitutional debates, the discussion relative to article I, section 4 centered principally around the reference to "place and time" (see 3 Elliot's Debates, pp. 60, 175, 366, 403-4; *Id.* vol. 2, p. 32).

Mr. Madison stated that this authority in Congress was necessary, and he gave several examples, all of which involved procedural matters (5 Elliot, pp. 401-402. See also 2 Elliot, pp. 22-34; 48-49; 325; vol. 4, p. 104).

Mr. Steele of North Carolina stated the issue very succinctly, viz:

"Every man who has a right to vote for a representative to our legislature will ever have a right to vote for a Representative to the General Government. Does it not expressly provide that the electors in each State shall have the qualifications requisite for the most numerous branch of the State legislature? Can they, with a most manifest violation of the Constitution, alter the qualifications of the electors? The power over the manner of elections does not include that of saying who shall vote: the Constitution expressly says that the qualifications which entitle a man to vote for a State Representative. It is, then, clearly and indubitably fixed and determined who shall be the electors; and the power over the manner only enables them to determine how these electors shall elect—whether by ballot, or by vote, or by any other way."

From another standpoint, it is clear that article I, section 4 does not support the validity of S. 2750, insofar as it would illegalize literacy tests. The words "times, places, and manner" appear in that sequence. "Times" and "places" are specific in nature, and precede the more general term "manner."

Consequently, under the rule of interpretation known as *ejusdem generis*, the meaning of "manner" is restricted by "times" and "places" (50 Am. Jur. 244, sec. 249). As stated in *Cutler v. Kouns* (110 U.S. 720, 728, 28 L. Ed. 305 (1884)).

"The rule of interpretation correctly stated is, that where particular words of a statute are followed by general, the general words are restricted in meaning to objects of like kind with those specified."

See also *United States v. Salen* (235 U.S. 237, 59 L. Ed. 210 (1914)), and *Cleveland v. United States* (329 U.S. 14, 18, 91 L. Ed. 12 (1946)).

Since "times" and "places" deal only with the physical or procedural aspects of an election, it is clear that "manner" must likewise be limited, and cannot be held to embrace such substantive matters as the qualifications of electors. To construe it otherwise would not only violate the rule of *ejusdem generis*, but

likewise completely nullify so much of article I, section 2, and section 1 of the 17th amendment, as adopt the qualifications prescribed by State law. Even as to the original Constitution, i.e., article I, section 2, all provisions must be construed so as to give effect to each (50 Am. Jur. 361, sec. 358), and to harmonize all parts and avoid inconsistencies (50 Am. Jur. 367, sec. 363). To assert otherwise here would require that we go even further and assume that section 1 of the 17th amendment, although a later expression of the people than article I, section 4, was nevertheless subordinate to the latter.

As pointed out in *Ex Parte Yarbrough* (110 U.S. 661, 28 L. Ed. 274 (1884)), and in *United States v. Classic* (313 U.S. 299, 85 L. Ed. 1368 (1941)), Congress can legislate so as to regulate the conduct of Federal elections so as to protect them against fraud, violence, and the like, even as against the acts of private individuals, but as stated in the *Yarbrough* case—

“* * * the importance to the General Government of having the actual election, the voting for those members, free from force and fraud is not diminished by the circumstance that the qualifications of the voter is determined by the law of the State where he votes” (p. 663).

Mr. Chairman, the proponents of these proposals are also urging us to accept the premise that the 14th and 15th amendments to the Constitution grant authority for this legislation. Let us examine the appropriate provisions of these two amendments.

Section 5 of the 14th amendment, and section 2 of the 15th amendment, authorize Congress to enforce those amendments by “appropriate legislation.”

Under these amendments, Congress is limited to legislating against State action discriminatory in nature. *Civil Rights Cases* (109 U.S. 3, 13, 27 L. Ed. 835 (1883)); *Lacey v. United States* (107 F. 114 (C.C. Ky. 1901), cert. den. 181 U.S. 621); *United States v. Cruikshank* (92 U.S. 542, 23 L. Ed. 588, 592 (1876)). In this respect, it is important to recall that Congress’ power under the 14th and 15th amendments is in a sense more restricted than its power to legislate as to the “manner” of Federal elections under article I, section 4. Under the latter, if the subject matter is legitimately concerned with the “manner” or conduct of the election process itself, Congress can legislate even as against private individuals, *United States v. Classic* (313 U.S. 299, 315, 85 L. Ed. 1368 (1941)), and such legislation is not limited to proscribing discrimination. *United States v. Munford* (16 F. 223 (C.C. Va. 1883)); *United States v. Foote* (42 F. Supp. 717 (D.C. Del. 1942)). Under the 14th amendment, however, Congress can legislate only so as to prevent discrimination, and under the 15th amendment, only as against discrimination based upon race or previous condition of servitude. *United States v. Reese* (92 U.S. 214, 23 L. Ed. 563 (1876)).

Applying these principles, it necessarily follows that any effort by Congress to outlaw literacy tests cannot be predicated upon either of these two amendments. Literacy tests uniformly have been upheld as against claims that they constituted discrimination. *Williams v. Mississippi* (170 U.S. 213, 42 L. Ed. 1012 (1898)); *Trudeau v. Barnes* (65 F. 2d 563 (CC 5th 1933)); *Darby v. Daniel* (108 F. Supp. 170 (D.C. Miss. 1958)); *Williams v. McCutley* (128 F. Supp. 897 (D.C. La. 1955)); *Lassiter v. Northampton County Board of Elections* (360 U.S. 45, 3 L. Ed. 2d 1072 (1959)).

Therefore, since literacy tests do not constitute discrimination, they cannot be reached under either the 14th or 15th amendments.

Moreover, the proposition goes even further here. To uphold S. 2750 in this regard would require a holding that the general reference in these two amendments is sufficient authority for Congress to supersede the specific language of article I, section 2, remitting all questions of qualifications to State law, and that such authority is also paramount to similar, specific language adopted subsequent thereto in the 17th amendment. In other words, the Government necessarily must contend that despite the rule that the latest expression of the law-making body controls, the plain language of the 17th amendment cannot be given effect because of the enforcement clauses of the earlier 14th and 15th amendments.

While Congress has wide choice in selecting means to implement its powers, *United States v. Classic* (313 U.S. 299, 320, 85 L. Ed. 1368 (1941)), the means sought to accomplish even a legitimate end must not be unreasonably broad, and may in no event themselves be violative of the Constitution. *Shelton v. Tucker* (364 U.S. 479, 5 L. Ed. 2d 231 (1961)); *Smith v. California* (361 U.S. 147, 4 L. Ed. 2d 205 (1959)); *Speiser v. Randall* (357 U.S. 513, 2 L. Ed. 2d 1400 (1958)).

Mr. Chairman, I have briefly attempted to point out some of the more important reasons why Congress cannot, by statute, abrogate a State's constitutional right to determine voter qualifications. In this regard it is also interesting to note that in the 1959 Report of the U.S. Civil Rights Commission, Commissioners Hannah, Hesburgh and Johnson recommended adoption of a constitutional amendment which would outlaw use of literacy tests. See Report, p. 143; 4 *Race Rel. L.R.* 791 (1959). It is significant that even such partisans who obviously favor abolition of literacy tests believe that a constitutional amendment will be required to accomplish it. Commissioners Storey and Carlton, who opposed the proposal agreed in this respect, for they declared:

"On principle, proposals for constitutional amendments which would alter long-standing Federal-State relationships, such as the constitutional provisional that matters pertaining to the qualifications of electors shall be left to the several States, should not be proposed in the absence of clear proof that no other action will correct an existing evil. No such proof is apparent." 4 *Race Rel. L.R.*, p. 793.

Mr. Chairman, I further submit that even if Congress possessed the power to legislate in this field such legislation is completely unnecessary and unwise.

As was demonstrated in the case of *Davis v. Schnell*, 81 F. Supp. 872 (D.C. Ala. 1949), a literacy test which is so vague on its face as to invite discrimination will be declared unconstitutional under the self-executing features of the 14th amendment's due process clause, and Federal legislation can add nothing to what the law already provides.

Similarly, if a literacy test is administered unfairly, such conduct can be enjoined under existing law. Such follows from section 1971, 42 U.S.C.A., in its present form. The aggrieved citizen does not even have to employ attorneys and bring his own case. The Attorney General will bring it for him at the expense of the United States, 42 U.S.C.A. 1971(c), as amended 71 Stat. 637 (1957). If a "pattern or practice" of discrimination is shown, the Federal courts are authorized to appoint voting referees to supervise registration and voting, thereby making administrative discrimination impossible.

As it presently reads, section 1971 is sufficient to deal with all conduct which Congress is authorized or should be authorized by the Constitution to regulate, at least in the present context.

S. 2750 is even more objectionable in another respect. The language relating to tests is not limited to matters of literacy. Section 1971(b), as amended, states that "Deprivation of the right to vote shall include * * * the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise * * *"

Under this broad language, convicted felons could be enfranchised. Suppose, for example, that a State requires a registrant to complete a questionnaire as to such matters as age, residence, and character. If the registrant completes this form and discloses a conviction for a serious offense, could it be said that his denial of suffrage was derived from his "performance in any examination"? It is not entirely clear that such a result would not be impossible under S. 2750.

Moreover, the same reasons which inspired the Constitutional Convention to adopt the voter qualifications of State law (art. I, sec. 2) weigh equally heavy today, and indeed, more so.

Elections for Members of Congress are almost always held at the same time and as a part of State elections at which State and local officers are elected. The effect of S. 2750 is to prescribe different qualifications for electors for Congressman and Senator than those prescribed by State law for State officers.

This will necessitate separate registers, separate ballots, separate voting machines, and may ultimately necessitate separate elections. Absentee voting will also be complicated.

Lastly, in view of the large number of Federal statutes now protecting the right to vote, it is submitted that additional legislation on the subject is not needed. In an appendix, the various statutes, both criminal and civil, affording protection against interference with the right to vote are enumerated and I ask that this be made a part of the record.

Under recent amendments to 42 U.S.C.A. 1971, revolutionary, far-reaching provisions are made in the field of voting rights. Suits by the Attorney General on behalf of private persons are authorized. The courts are empowered to issue orders declaring certain persons qualified to vote, and to appoint voting referees to supervise election procedures.

Under section 1974, voting records must be preserved, and made subject to inspection.

The Civil Rights Commission, armed with unheard-of investigatory procedures as a result of the decision in *Larche v. Hannah*, 363 U.S. 20, 4 L. Ed. 2d 1307 (1960), is given a roving commission to conduct investigations and issue compulsory process to harass, accuse, and try State election officials.

This is and should be enough. Merely because isolated cases of abuse occasionally arise, necessitating litigation, is no reason to abrogate the Constitution. All laws necessarily must be enforced in the courts according to established procedures, and due process of law always entails some delay and expense.

When a crime is committed, no one would suggest that we dispense with constitutional principles simply because the crime is shocking, brutal, or one too frequently committed.

These proposals stand on no better footing, and I hope this subcommittee will disapprove them.

APPENDIX

FEDERAL STATUTES PROTECTING THE RIGHT TO VOTE

CRIMINAL PROVISIONS

- 18 U.S.C.A. 241: Conspiracy Against Rights of Citizens.
- 18 U.S.C.A. 242: Deprivation of Rights Under Color of Law.
- 18 U.S.C.A. 594: Intimidation of Voters.
- 18 U.S.C.A. 595: Interference With Voting by Officers of Government.
- 18 U.S.C.A. 597: Expenditures to influence voting.
- 18 U.S.C.A. 601: Deprivation of employment or other benefit for political activity.

CIVIL PROVISIONS

- 42 U.S.C.A. 1971: Deprivation of Right to Vote Based on Race, etc.; Injunction by Attorney General; Exhaustion of remedies not required; voting referees; orders qualifying persons to vote; contempt.
- 42 U.S.C.A. 1972: Interference with Freedom of Elections by Armed Forces.
- 42 U.S.C.A. 1974: Retention of Voting Records.
- 42 U.S.C.A. 1975: Commission on Civil Rights; Investigation of Reports Relating to Deprivation of Voting Rights.
- 42 U.S.C.A. 1981: Equal Rights Under the Law.
- 42 U.S.C.A. 1983: Actions for Deprivation of Rights Under Color of Law.
- 42 U.S.C.A. 1985: Conspiracies to Interfere with Civil Rights; Voting Rights.
- 42 U.S.C.A. 1986: Liability for Failure to Prevent Violation of Section 1985.
- 42 U.S.C.A. 1987: Prosecutions by Federal Officials of Violations of Civil Rights Statutes.

Senator ERVIN. I will ask the Senator if those who demand the enactment of these bills are really demanding that Congress violate section 2 of article I, the 17th amendment, because some election officials in some States have violated the State law prescribing a literacy test.

Senator TALMADGE. The Chairman is eminently correct. It would go even beyond that. In order to pass these bills, it would amount to an amendment of the Constitution of the United States by legislative enactment alone, and, of course, the manner of amending the Constitution is prescribed in that document, and it is not permitted by legislative enactment.

Senator ERVIN. Now, the Senator was referring a moment ago to the broad scope of some of these bills. I invite attention to S. 480, in which I will ask the Senator if there are not some States that prohibit insane persons from voting.

Senator TALMADGE. Indeed they do. As I recall, my own State does prohibit that.

Senator ERVIN. I will ask the Senator if S. 480, which forbids any test as to comprehension or intelligence of any citizen who has completed the sixth grade would not result in permitting insane persons to vote?

Senator TALMADGE. I do not think there is a doubt about it.

Senator ERVIN. I would like to ask the Senator if he thinks the Supreme Court was correct in the *Lassiter* case when it made this statement—

The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot.

Senator TALMADGE. Indeed I do. I would hate to think that our electorate in exercising every function of electing officers governing our National, State, municipal, and county governments did not have the competence to read and write.

Senator ERVIN. I would like to ask the Senator if he also agrees with this statement in that case.

Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show.

Senator TALMADGE. That is entirely correct.

Senator ERVIN. Now, in the *Lassiter* case, the Supreme Court of the United States said there was no suggestion that the North Carolina literacy test, which applied alike to all persons of all races, was being used to circumvent the Constitution.

Senator TALMADGE. That is correct, sir.

Senator ERVIN. I will ask the Senator if in the *Williams v. Mississippi* case, where the Supreme Court of the United States upheld the literacy test of Mississippi, if the Supreme Court did not say in that case that you could not strike down as unconstitutional a State literacy test merely because it might be possible to do some evil in its actual administration.

Senator TALMADGE. It did.

Senator ERVIN. Did not the Supreme Court of the United States sustain the language of State literacy tests in the *Guinn* case, in Oklahoma, the *Lassiter* case in North Carolina, and the *Williams* case in Mississippi?

Senator TALMADGE. They did.

Senator ERVIN. And did not the Circuit Court of Appeals for the proper circuit uphold the literacy test of Louisiana in the *Trudeau* case?

Senator TALMADGE. They did.

Senator ERVIN. And did not the Supreme Court refuse to grant certiorari and review the decision in the *Trudeau* case?

Senator TALMADGE. The chairman is correct.

Senator ERVIN. I will ask the Senator if these bills do not present this very peculiar situation. Is this not the proposition being put to Congress by the proponents of these bills? That the Congress shall declare all State literacy tests arbitrary and unreasonable and unconstitutional as in violation of the 14th and the 15th amendments, notwithstanding the fact that the Federal courts, which have all of the judicial power of the Nation, have expressly declared on at least four occasions that literacy tests of this nature are constitutionally adopted by the States, and do not violate the 14th and 15th amendments.

Senator TALMADGE. The chairman's statement is entirely correct.

Senator ERVIN. In other words, in the last analysis, the proponents of these bills are asking that Congress declare section 2 of article I and the 17th amendment unconstitutional, and declare that the Supreme

Court of the United States was absolutely wrong when it adjudicated that State literacy tests were valid.

Senator TALMADGE. That would be the effect if one of these bills were adopted.

Senator ERVIN. I want to thank the Senator for his very fine exposition of the provisions of the Constitution relating to these bills.

I wish to say that the Senator from Georgia has been one of the greatest advocates of the preservation of constitutional government in the United States in the Senate in the history of the Nation. I wish to commend him, because I feel that the Senator from Georgia, and those who share his views, are fighting against great odds to try to preserve the Constitution of the United States for the benefit of all Americans, of all generations, and all races.

Senator TALMADGE. I am grateful indeed for the generosity of the chairman's compliments, and I appreciate the privilege of appearing before this subcommittee.

Senator ERVIN. The committee will stand in recess until 10 o'clock in the morning.

(Whereupon, at 4:25 p.m., the committee took a recess until 10 a.m., Wednesday, March 28, 1962.)

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

WEDNESDAY, MARCH 28, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin and Keating.

Also present: William A. Creech, chief counsel and staff director; Robinson O. Everett, counsel; and Bernard Waters, minority counsel.

Senator ERVIN. The subcommittee will come to order.

The committee will be delighted to hear at this time from the able and distinguished junior Senator from Alabama.

STATEMENT OF HON. JOHN SPARKMAN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SPARKMAN. Thank you, Mr. Chairman and gentlemen of the committee. I have a prepared statement on this matter. It is several pages in length. I must say that after hearing the distinguished chairman of this subcommittee speak on this subject in the Senate a few days ago, I well realize that there is little that anyone can say to add to what he said relating to this matter that is before us.

I welcome the opportunity to appear before this committee to present my views concerning the recently proposed legislation on literacy tests, S. 2750, which I consider to be neither constitutional nor necessary.

In substance, the proposed measure before this committee provides that any person qualified by law has the right to vote, if such person has not been judged incompetent and has completed the sixth grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

This measure, in my judgment, would violate the traditional concept of the division of powers between the Federal and State Governments in an area in which the Constitution has been explicit. This explicitness is manifested by the fact that today, no less than 19 States have some form of literacy tests in order to determine whether prospective voters are qualified to vote. These States, representing a cross section of our entire Nation, under the powers delegated to them by

the Constitution, have seen fit to require a minimum of understanding as a prerequisite for exercising the precious privilege of voting. Now it is recommended that article I, section 4, which has been a part of our Constitution for over a century and a half, and the 14th and 15th amendments, which have been a part of our Constitution for almost a century, should be interpreted as a mandate for usurping the power of each State to determine the qualifications of electors. I cannot agree with this.

Senator ERVIN. As a matter of fact, Senator—pardon the interruption—section 2 of article I has been in effect for 172 years.

Senator SPARKMAN. Yes—in fact, ever since the Constitution was written.

Senator ERVIN. Ever since George Washington was inaugurated President of the United States the first time.

Senator SPARKMAN. Well, even some time before that. I guess it became effective in September of 1789.

Senator ERVIN. That is right.

Senator SPARKMAN. The Constitution completed its adoption, as I recall, in 1789. And it has been a part of the Constitution ever since that time.

The Constitution authorizes the State—I was going to say—legislatures to determine the manner of appointing presidential electors. Therefore, whether there is a vote by the people who are qualified and the manner of holding the election rests in the discretion of the State legislatures.

In article II, section 1, the Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: * * *

As to the Congress, it provides:

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Mr. Chairman, in that last statement is given very clearly the part that is delegated to the Federal Government, and that sums it up, in just that very short statement. Congress has the power to determine the time of choosing electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

There is no counterpart to article I, section 2, the 17th amendment, which provides that Senators and Representatives are to be elected by the people, or to the provision in article I, section 4, which provides that Congress may make or alter regulations on the times, places and manner of holding elections for Senators and Representatives. The only restrictions on the States are those encompassed within the 14th, 15th, and 19th amendments, which, of course, bear upon all elections, and the selection of the President and Vice President by State electors as stated in the 12th amendment.

In substance, the selection of the President is constitutionally a two-fold procedure: first, the appointment of presidential electors within a State; and, second, the selection of a President by the electors. The language in the Constitution is clear, and the U.S. Supreme Court has on a number of occasions preserved the selection of presidential electors

to the exclusive control of the States. *Ray v. Blair*, 343 U.S. 214 (1952); *McPherson v. Blacker*, 146 U.S. 1 (1892); *In re Green*, 134 U.S. 377 (1890).

In the case of *McPherson v. Blacker*, *supra*, the Supreme Court, after reviewing the history of the methods adopted by the States for the selection of presidential electors, asserted:

In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *re Green*, 134, U.S. 377, 379, "no more officers or agents of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people of the State when acting as the electors of Representatives in Congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power of jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and Federal influence might be excluded.

Moreover, the Court, in rejecting the contention that a State which previously adopted a general statewide ticket in choosing presidential electors and which now employs a district system, was violating the 14th and 15th amendments by preventing qualified voters from casting their ballots on all electors, remarked:

"* * * The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendment every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors."

The object of the 14th amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the State and Federal Governments to each other, and of both governments to the people. *In re Kemmler*, 136 U.S. 436.

The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation. *Pembina Company v. Pennsylvania*, 125 U.S. 181.

The Court, in conclusion, stated:

"* * * if presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made * * * unless the authority vested in the legislatures by the second clause of section 1 of article II has been divested and the State has lost its power of appointment.

The exclusive power preserved to the States in regard to electors is even more evident in the case of *Walker v. U.S.* 93 F. 2d 383 (8th Cir. 1937), where the court of appeals touched on the question of qualifications, although the issue involved was whether or not falsification of the vote on candidates for presidential electors was a Federal criminal offense. In holding that this was not a Federal offense, the court discussed the Government's reliance upon *Ex Parte Yarborough*, 110 U.S. 651 (1884), which had held that electors for Members of Congress did not owe their right to vote exclusively to State law. But the court pointed out that—

we are here discussing the status of presidential electors [not Members of Congress]. Manifestly, the right to vote for presidential electors depends directly and exclusively on State legislation.

Proponents may contend that the case of *Burroughs v. United States*, 290 U.S. 534 (1934) lends substance to Federal interference in the selection of presidential electors. However, in that case, the court was careful to point out that the Corrupt Practices Act "neither in purpose nor in effect * * * interferes (d) with the power of a State,

under section 1, article II, of the Constitution to appoint electors or the manner in which their appointment shall be made." The court explained that the act was confined to situations which, if not beyond the power of the State to deal with at all, were beyond its power to deal with adequately. It in no sense invaded any exclusive State power. The principles expounded in that case can in no way be applied to the proposed legislation before this committee, which creates a uniform qualification for voters of all States. The States have long been able to adequately appoint their presidential electors.

The manner of appointing presidential electors, as stated in the decisions I have analyzed, preserves such activity as an exclusive State power. This has been reaffirmed as late as 1952 in *Ray v. Blair, supra*. In my judgment, there is no question that if a State chooses to elect its electors by popular election, it does have the exclusive power to prescribe qualifications for its voters, as long as there is no contravention of the 14th and 15th amendments. (In re *Opinion of Justices*, 118 Me. 552, 107 A. 705 (1919).)

Qualifications of voters for congressional elections have long been considered a matter committed to the States, subject only to Federal constitutional restrictions prohibiting discrimination on account of race, color, or sex. *Pope v. Williams*, 193 U.S. 621 (1904); *Ventre v. Ryder*, 176 F. Supp. 90 (1959). The power of the States to deal with this matter is encompassed within article I, section 2, and the 17th amendment.

Article I, section 2, provides:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The 17th amendment provides:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Mr. Chairman, I want to mention something there that was called to my attention in a very able presentation made on the floor of the Senate several days ago by the distinguished Senator from Georgia, Mr. Talmadge. He called attention to the fact that the exact words of section 1, article II, relating to the qualifications of electors, were repeated in the 17th amendment. And, of course, the chairman knows that there are—the exact words. And he said this is the only point in the Constitution in which there is a repetition of words. Remember the 17th amendment was adopted fairly recently—1913, if I remember correctly.

Accordingly, in a number of cases the Supreme Court has upheld provisions in State constitutions or laws prescribing qualifications of voters. *Minor v. Happersett*, 88 U.S. (21 Wall) 162 (1874), denial of suffrage to women; *Mason v. Missouri*, 179 U.S. 328 (1900), partial registration system; *Pope v. Williams, supra*, declaration of intent to become a citizen; *Myers v. Anderson*, 238, U.S. 368 (1915), ownership of property; *Breedlove v. Suttles*, 302 U.S. 277 (1937), poll tax; *Lassiter v. Northampton County Board of Elections, supra*; *Trudeau v. Barnes, supra*, *Guinn v. United States, supra*, and *Williams v. Mississippi, supra*, literacy tests.

Despite this long history of judicial interpretation, proponents now contend that article I, section 4 and the 14th and 15th amendments now give the Federal Government the authority to usurp specific powers delegated to the States.

Accordingly, I have examined carefully court decisions in regard to these provisions.

The contention that article I, section 4 encompasses or applies to qualifications of voters, in my judgment, is without merit. As stated in *United States v. McElveen*, 177 F. Supp. 355 (1959), under Federal constitutional authority to regulate the manner of holding elections for Federal office and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,

Congress may also control the registration, but not the qualifications, of voters in Federal elections * * *.

Poll taxes have long been considered to be within the area of voter qualification and to come within the purview of article I, section 2, and the 17th amendment.

By the way, may I say, Mr. Chairman, that that principle was recognized as being a qualification within the control of the States by the very action that the Senate took yesterday, in passing the constitutional amendment and striking down a proposal for a simple statutory enactment. And it was also recognized in the case of granting women's suffrage, and also back in the amendments giving the right to vote to recently freed slaves.

In other words, every time, heretofore, that any action has been taken relating to qualifications of voters, qualifications that are left with the States, when the Constitution was adopted. Every time it has been recognized as requiring a constitutional amendment, and not being sufficiently rested upon a simple statutory enactment.

Turning now to the rights secured under the 14th and 15th amendments, which I believe proponents rely upon most heavily, the Supreme Court has said, that these amendments do not confer the right of suffrage. *Lassiter v. Northampton County Board of Elections*; *Guinn v. United States*; *Minor v. Happersett*; *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

In the case of *Guinn v. U.S.* and *Lassiter v. Northampton County Board of Elections*, the Supreme Court said that literacy tests as a prerequisite to voter qualifications are completely consistent with the 14th and 15th amendments.

In the *Guinn* case, the Court said:

* * * No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.

The Court went on to say in reference to the 15th amendment:

Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rest would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment seeks to regulate its exercise as to the particular subject with which it deals.

Senator ERVIN. If the Senator would pardon an interruption at this point, it is of interest to note that in the *Baker* case, the Tennessee Reapportionment case handed down the day before yesterday, Mr. Justice Douglas used as a basis for his opinion that the Court could act in that matter, the fact that the power to prescribe the qualifications for voters rested in the States.

Senator SPARKMAN. Yes. I have related some cases recently decided. I am glad the chairman brought in one very recently decided, just the day before yesterday.

In the case of *Lassiter v. Northampton County Board of Elections*, decided in 1959, Justice Douglas, in speaking for a unanimous Court, reaffirmed the principles expounded in *Guinn v. U.S.* and remarked:

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345, 347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise * * *. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage. *Stone v. Smith*, 159 Mass. 413, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

Mr. Chairman, I am sure the chairman is familiar with that case, which I believe came from his State, North Carolina.

I call attention again to the fact that it was an unanimous decision of the court, as recent as 1959, and the unanimous opinion was written by Justice Douglas, whom the chairman cited just a moment ago in a case that was decided just the day before yesterday.

The Court, in conclusion, pointed out that there was no inference charging a violation of the 15th amendment, and that

the test required by North Carolina seemed to be one fair way of determining whether a person was literate, and not a calculated scheme to lay springes for the citizen.

Proponents may also contend that the Supreme Court decisions, which have not always been uniform as to whether the right to vote for a Member of Congress has a State or United States source, add to their argument. In fact, there is no fundamental conflict between the statements. It is important to recognize that in speaking of a State source, these assertions are made in reference to qualifications of electors, and not in reference to other election matters, such as the power to regulate the manner of holding congressional elections. *Pope v. Williams*. This is made perfectly clear in the case of *Ex Parte Yarbrough*. While the Court there said that the right to vote for a Member of Congress is a right or privilege secured by the Constitution, it also stated that:

The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their

own legislature, and the Constitution of the United States says the same persons shall vote for Members of the Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress * * *. The Court did not intend to say (in *Minor v. Happersett*) that when the class or person is thus ascertained, his right to vote for a Member of Congress was not fundamentally based upon the Constitution, which created the office of Member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

While Congress may have the power to enact laws to prohibit discrimination because of race, color, or previous condition of servitude, for Congress to enact legislation which makes a presumption of literacy is, as I have mentioned, tantamount to usurpation of the sovereign rights of the States and in derogation of the Constitution, which specifically leaves qualifications of voters within the purview of the States' powers. None of the provisions, which the proponents rely on in the proposed measure, give Congress a carte blanche, but limit the Congress in the area in which it has the power to act.

If one of the purposes of this bill is to qualify Negro voters in the South overnight, and undoubtedly there is some sentiment to support this, there is little guarantee of success even with the aid of this legislation.

Perhaps the committee is familiar with a report of the Southern Regional Council, which found that the Negro's "lack of political consciousness" remains the greatest barrier to voting. Moreover, the 1961 Report by the Commission on Civil Rights might aid us in understanding why. It is pointed out in this report that 23.5 percent of nonwhites 25 years of age or over, were deemed functionally illiterate (completed less than 5 years of school) compared to 6.4 percent of whites. Median number of school years completed by nonwhites 25 years old and over was 8.1 compared to 11.4 for whites. Only 20 percent of nonwhites compared to 45.3 percent of whites had high school or better education; 49.5 percent of nonwhites compared to 80.8 percent of whites had elementary school or better.

Our primary concern, according to the statistics I have cited, would seem to be one of educating this mass of untapped potential resource, and creating a responsible citizen who can exercise the ballot intelligently. I seriously doubt that a presumption of literacy because one has a sixth grade education will create "political consciousness" or an intelligent elector. We are all aware that a democracy, more than any other form of government, calls for a literate population. In order to function effectively in a democracy, all citizens must think clearly and independently, and effectively participate in the skills of communication. What this proposed piece of legislation does is assault our whole concept that responsible democracy rests upon responsible voters. The right to vote is a privilege as well as a duty, and we should work hard to secure this right for all, but the way is to lift up those who are not able to share in the responsibility and not to debase this privilege.

What sense does it make to set the literacy qualifications at the sixth grade level? There are those who have gone through six grades and who remain totally ignorant of the complexity of our Government and the everyday issues involved. On the other hand, and I want to stress this, there are those who have, because of necessity, had less education, but who through perseverance, ambition, and self-

education, have become intelligent and responsible citizens. Those who fall into this latter category may be few. Nevertheless, the arbitrary limitation of not having a sixth grade education would require these people to take a literacy test. This strikes me as an attempt to treat all human beings like inanimate objects. A sixth grade education does not prove or disprove anything. It certainly does not mean that everyone with a sixth grade education is literate, any more than all those with a fifth grade education are illiterate.

In my judgment, the measure proposed not only violates the powers which have been conferred to the States, but is itself discriminatory.

For these reasons, I am of the strong opinion that the proposal would be unconstitutional, and should not receive the approval of this committee.

Senator ERVIN. The census of 1959 shows that 25.5 percent of non-whites had not completed the fifth grade of school, and that 6.4 percent of whites had not.

Senator SPARKMAN. That is right.

Senator ERVIN. If a State were to adopt as a literacy test the requirement that a person shall have completed the sixth grade, does not the Senator from Alabama think that those who entertain the views of the proponents of these bills would have urged that that violated the 15th amendment, because it would result in disfranchisement of almost 400 percent more Negroes than white people?

Senator SPARKMAN. I think the able chairman has a point there. I may say I cited those figures that the chairman has just referred to, and emphasizing the fact that it would be harmful—and I certainly subscribe to the idea advanced by the chairman, that it would be discriminatory.

Let me say this, in my own experience.

I have seen Negroes in my community go before the registration board, and register, and become voters, who had, I would guess, not even a third grade education. But they were people who had been working, they knew the community, they knew what was going on, they had served their country in time of war, and they were admitted as voters.

Now, I think that the adoption of this kind of a constitutional amendment would be a suggestion—it of course would not say to the States that you must raise your literacy test to a sixth grade level—but I think it would certainly contain the suggestion, and the chairman knows so often we have the illustration in enacting laws where something is to become the ceiling, and it immediately becomes the floor, and vice versa.

In other words, the writing of this into the Constitution would suggest that the proper level in this country would be a sixth grade education.

Now, Mr. Chairman, I can remember back when I was a boy. I dare say the average citizen in the community where I grew up had nothing like a sixth grade education. My father, I dare say, of course back in those days, they didn't know what grades were, they just went to school, and studied books for a period of time. As a matter of fact, that was not done away with too recently. That was true when I went to school. I didn't know what grades were. I just went and started studying books, and studied that book until I finished it

and studied another book. When I studied all the books the local school had, they told me I ought to go downtown to high school, about 4 miles away. So I went down to high school.

I didn't even know what grade to go into. I went into the first room, which was the lowest grade. That happened to be the seventh grade. The teacher was a little late coming in so I got to wondering why should I wait around there, so I just got up, quietly walked into the next grade room, the 8th grade. And that was where I was promoted from the 7th to the 8th grade. I never knew what grades were, until I started high school.

My father was one of the most alert citizens in the community. Yet he couldn't have qualified under this proposal if a sixth grade education were needed. And I dare say—I doubt that a fourth of the people could have qualified under that criterion. In fact, I don't know how they would have measured a sixth grade education.

We had school only a few months in the year.

It is true that in many areas of the South, a great many of our people even now don't have a sixth-grade education. I don't think that is true with the upcoming generations, because we have done a remarkably good job in stepping up our education in the South for everybody, regardless of race. I am sure that in future years they will have a sixth-grade education or better. And yet a great part of them—well, that report shows in 1959, 23½ percent of the Negro citizenry of the Southern States, I think it was—does the chairman remember?

Senator ERVIN. I don't know whether it is the Southern States only or the country as a whole.

Senator SPARKMAN. I am not sure offhand either. But anyhow, 23½ percent of them did not have a sixth-grade education. They would be denied the right of vote if this level were adopted as a necessary standard of literacy tests in this country.

I think the individual State has a much better opportunity of judging conditions in that State and of setting its own literacy test.

On the other hand, I can think of people who have a sixth-grade education, who have gone through the sixth grade, and probably do not have the understanding of our system of government that ought to permit them to register and vote.

Let us say that a person comes here from a foreign land. He may have had a fine education in his homeland. He may stay here long enough to take out first papers for citizenship, go on and complete his citizenship. Is he going to have an understanding of our system of government to such an extent that he can exercise the privilege of voting—unless he actually studies in this country, has some kind or some course of preparation?

I remember in the course of debate on the Senate floor 2 years ago, I guess it was, some point was brought out about qualifications of voters. The point was brought out—something that I never had known—that the great group of Puerto Ricans who live in New York, who can't speak English, are denied the right to vote. I believe that some States put certain restrictions on Indians, and other groups. Maybe those Puerto Ricans have had a fine education, maybe they have had a high school education. And yet the State apparently realizing that they did not understand the system of government right

off, wrote a provision in its law that unless they got to the point where they could understand English, they could not vote.

Now, who am I to say that this is an unreasonable restriction, even though they have got a sixth-grade education or better? And who is it in some other States that is to say that a Negro down in my State that has a third-grade education, but is a good citizen, has defended his country in time of danger, is not entitled to vote because he doesn't have a sixth-grade education?

I think it is a bad proposal, and I agree with the chairman that it would be discriminatory.

Senator ERVIN. I think counsel has some questions he would like to ask you.

Mr. CREECH. Senator, Alexander Hamilton, writing in the "Federalist Papers No. 60," stated that the authority of Congress—

would be expressly restricted to the time, place, and manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked on other occasions, are defined and fixed in the Constitution, and are unalterably national legislation.

Now do you feel that this statement, sir, is consonant with your position that in those instances in which Congress has acted to change voter qualifications it has not done so by legislative act, but only by constitutional amendment?

Senator SPARKMAN. Yes. As a matter of fact, in the talk I made on the Senate floor a few days ago, on the poll tax amendment, I quoted that paper of Alexander Hamilton, writing in the Federalist—I quoted that.

Yes, I think it is in complete accord with what I have said. I said a few minutes ago, you will remember, that the Government of the United States, Congress, the executive department, all have recognized in the past that when qualifications of voters were to be changed, it had to be done by constitutional amendment—for the very reason that the power was not lodged in the Federal Government, that could be handled through a statutory enactment, but was one that was left—and I am not saying given to the States, it wasn't given to the States, it belonged to the State originally, and was left there, when the Constitution was written.

Mr. CREECH. Sir, you have discussed at some length the two bills, S. 480 and S. 2750. Of course, as you know, S. 2979 was referred to this subcommittee late last week, and also is being considered today.

With regard to S. 480, the subcommittee has been told that one criticism of the bill is that while the Supreme Court has gone so far as to hold that in primaries, where one political party dominates, this amounts to a Federal election—if a Federal position is involved, they have not yet said anything in particular about how a State should conduct its local and municipal elections.

Now, sir, in view of the fact that S. 480 is not limited in application to primaries, where the election of a Federal officer is involved, but would extend to all State elections, what would be your view of this criticism?

Senator SPARKMAN. Well, I think such a proposal as that is unconstitutional. I don't see how there could be any argument to sustain the right of Congress to legislate on matters that are purely local.

Mr. CREECH. Sir, assuming that Congress may legislate relative to a State election, respecting literacy qualifications or requirements—

then would it not also be possible for Congress to legislate respecting the age requirements or the residence requirements?

Senator SPARKMAN. Well, I prefer to rest my case a little differently by saying that Congress doesn't have the right to legislate on any of them. I don't concede that Congress has the right to legislate on literacy tests. They all belong in the same category, and they all belong to the States, where they have rested since the first State was formed in this country.

Mr. CREECH. Well, sir, S. 2979, which was referred to the subcommittee last week, would provide that only in four instances could an individual be refused the right to vote in any State.

They are the following: inability to meet reasonable age requirements, inability to meet reasonable requirements as to length of residence within the State or its political subdivisions, legal confinement at the time of the election or registration, and conviction for a felony.

Now, sir, if this bill, S. 2979, were enacted into law, it would adversely affect the constitution of your State, and some of the laws of your State, since your State constitution disqualifies from voting idiots and insane persons, who would not be covered by this bill, unless of course they were confined to an institution. By the same token, your constitution prohibits from voting individuals convicted of a number of crimes, some of which may not be considered felonies under the Federal criminal statutes.

Senator SPARKMAN. I believe under our constitution it would have to be a felony or one involving moral turpitude.

Mr. CREECH. That is right, sir. And of course by the Federal criminal statute, if it were not punishable by imprisonment of 1 year, it would not be considered a felony. So crimes of moral turpitude, if the imprisonment were not for 1 year, would not be covered. And then of course there are other persons, in the fourth category, in your State—those people who have interfered with elections and made false affidavits, and so forth.

I wonder, sir, if you would care to comment on the restrictions of this bill, in view of the fact that it would affect either the constitutions or the statutes with regard to voter qualifications in 45 of the 50 States.

Senator SPARKMAN. I may say that I was not familiar with the bill, I had not seen it, did not know it had been introduced. But from what you have told me, I certainly think it is wholly bad. I was going to suggest that a bill such as that would probably run counter to either statutory or constitutional provisions in every State in the Union. Of course it may be that the enactment of the literacy test bill would have the same effect—even though it deals with just one of the qualifications. S. 2979 would take over the entire field of qualifications. In other words, after that—if that bill should be enacted into law, and should be held constitutional—and I don't think any court in the land would ever hold that bill constitutional—then it would take over completely the matter of qualifications of electors, which is in clear contravention of the Constitution.

I don't see how there could be any argument for the constitutionality of that bill.

Senator ERVIN. Senator, I would like to ask you one thing about the amendment made in 1960, to the Civil Rights Act of 1957.

Now, it is said by the proponents of this bill that it is necessary to enact one of these bills into law. Does not the 1960 amendment legislate on the basis of the 15th amendment? It provides that whenever a suit is brought under the 1957 act, in the name of the United States, and at the expense of the taxpayers, and the judge finds in such case that nonwhites or Negroes have been denied the right to vote on account of their race or color and that such denial has been pursuant to a pattern, then the judge can appoint voting referees to pass on the qualifications of voters, and that these voting referees will take the testimony on the literacy test, in an ex parte proceeding, from which the members of the State election officials are excluded, and denied the right to cross examination. And it further provides that in case of any exception filed by the attorney general of the State to the recommendation or findings of the voting referees, the judge shall determine that fact solely upon the evidence taken in the ex parte proceeding by the voting referee.

Do you think that that statute is sufficiently broad in scope to secure the right to vote of every qualified Negro in any precinct anywhere in the United States?

Senator SPARKMAN. I certainly do. And it was based upon the use of these qualifications. In other words, even that, which I thought was going entirely too far, and was violative of the Anglo-Saxon judicial procedure system—yet even in that, it recognized that the qualifications were to be set by the State. And the things that these people who are appointed by the Federal judge have to consider are the qualifications that have been set.

In other words, they don't consider whether those qualifications are good or not. They consider whether or not the would-be voter meets the requirements of those qualifications.

In other words, it recognizes even there, by indirection, the right of the State to set the qualifications.

Senator ERVIN. I would like to observe that I agree with the Senator from Alabama. This is the only instance I know where the law excludes a party from the part of the trial that affects his rights.

Senator SPARKMAN. That is what I had in mind.

Senator ERVIN. And denies him the right to confront his accusers, the right to hear testimony.

Senator SPARKMAN. That is right. That is the reason I said it was violative of the Anglo-Saxon sense of justice.

Senator ERVIN. Now, I want to ask the Senator. A great deal of talk is made about the difficulty of administering a thing of this kind. I would ask the Senator if it isn't true that all that need be done is to put the applicant in a chair beside the voting referee or the Federal judge trying the case and hand the applicant whatever he is required to read, and let him read it, and then let him write it. The voting referee or the judge could determine this matter in just a few minutes, couldn't he?

Senator SPARKMAN. Well, if he had the literacy standards of the chairman, I think he passed that test in about 6 seconds, wasn't it, on the floor of the Senate the other day. Was that not right?

Senator ERVIN. Yes. I think we can demonstrate it here. I don't want to drag it out too long. I will see if I can qualify you under the North Carolina literacy test.

Senator SPARKMAN. I may not pass the test.

Senator ERVIN. No, I am going to do it. I am going to show you how long it would take a voting referee or a Federal judge sitting without a jury to determine this.

Now, the North Carolina literacy test is set forth in section 4 of article IV, and it provides that every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language.

Now, suppose you select here the preceding section, section 3 of the article.

Senator SPARKMAN. Well, let me select another section. They might say you had one picked out.

Senator ERVIN. All right.

Senator SPARKMAN. Take this one right here.

Senator ERVIN. All right. Section 7.

Senator SPARKMAN. Section 6.

Senator ERVIN. Section 6.

Elections by people and general assembly. All elections by the people shall be by ballot, and all elections by the general assembly shall be by verbosa.

Have I satisfied you?

Senator SPARKMAN. Even with the Latin included.

Senator ERVIN. Now, I wish you would get your watch and see how long this takes.

Senator SPARKMAN. I will.

Senator ERVIN. Well, let's start off again.

Section 6, Elections by people and general assembly. All elections by the people shall be by ballot, and all elections by the general assembly shall be by verbosa.

Senator SPARKMAN. Ten seconds.

Senator ERVIN. Now I will start to write. You look at your watch.

Senator SPARKMAN. All right.

Senator ERVIN. I will write the same thing.

All right.

Senator SPARKMAN. Sixty-five seconds.

Senator ERVIN. That would be a total of how much to pass the entire test, sitting in a court, before a Federal judge or voting referee, or before a registrar?

Senator SPARKMAN. A minute and 20 seconds.

Senator ERVIN. So, don't you think it is nonsense to say that a literacy test of that type is too cumbersome?

Senator SPARKMAN. Well, I certainly do.

Senator ERVIN. Just to point it out plainly, the 1957 Civil Rights Act and the 1960 amendment to the 1957 Civil Rights Act provides for equitable proceedings, trial before a judge without a jury, and if a pattern of discrimination based on race is shown, trial by the court by voting referees without a jury, and without the presence of adversary parties.

So the procedures which you and I went through just a minute ago could be adopted by the Federal judge or by the voting referee, couldn't it?

Senator SPARKMAN. It certainly could.

Senator ERVIN. And be no more cumbersome than that.

Senator SPARKMAN. It certainly could.

Senator ERVIN. I don't know whether the Senator from Alabama agrees with me on the point, but does not the Senator from Alabama think that the rules of civil procedure applicable to Federal district courts now permit very sloppy complaints to be drawn in a very short fashion, and does not he think that any competent lawyer could draw a complaint to base a suit on—well, just comparatively—in less than an hour.

Senator SPARKMAN. It could be very easily done.

Senator ERVIN. And in these voting rights cases, the Department of Justice could adopt a form, could it not, with just a blank place in the form to state what the venue of the action was and the names of the plaintiffs and the names of the defendants, and the official statement of the defendant.

Senator SPARKMAN. Certainly, there could be a regular standard form. They would just have to go to the clerk's office, get one and fill it out.

Senator ERVIN. The printing press could run them off.

Senator SPARKMAN. That is right.

Senator ERVIN. And any competent lawyer could fill out one of those forms in a few minutes, could he not?

Senator SPARKMAN. Yes, easily.

Senator ERVIN. And the Department of Justice has a full-time district attorney and a full-time assistant district attorney in every Federal judicial district in the country.

In addition to that, they have many lawyers up there in the so-called Civil Rights Division of the Department of Justice, and in the Department of Justice generally.

Senator SPARKMAN. Yes, sir. Not only could a lawyer fill them out, but it could be made so simple, I mean the form required by the court, could be simplified to the extent that any person who was literate could fill it out.

Senator ERVIN. Wouldn't it be even more difficult to try the question of whether a man had a sixth grade education than it would to determine whether he could write and write a section of the Constitution in the English language.

Senator SPARKMAN. Yes. And I don't know how they would ever establish the fact that a person did have a sixth grade education. That would involve considerable work itself, that is, with people migrating over the country as they do.

Mr. WATERS. Senator, I think we have had a good demonstration by our able and distinguished chairman, a good trial lawyer, demonstrative evidence indicating that the entire test ought not to take at best any longer than about a minute and 20 seconds. Wouldn't you say that it would be all right for any registrar to give the test in any parish or county where it is given?

Senator SPARKMAN. Well, it seems to me the test taken by the Senator from North Carolina could be taken by any applicant for the right to vote before any registrar, yes.

Mr. WATERS. And any length of time very much in excess would probably be unnecessary, wouldn't you agree?

Senator SPARKMAN. It depends on the section of the Constitution picked out. It happened that I picked out a very short section.

Mr. WATERS. Senator, would you agree that Congress has a right to legislate concerning its own elections?

Senator SPARKMAN. Congress has the right to legislate concerning its own elections within the provision of the Constitution giving it the right to do that, and only within that.

Mr. WATERS. In connection with bill No. 2750, Senator, certainly you understand that it doesn't purport to set a standard as such, but merely indicates that, in a quoted part from the bill on page 3—

Deprivation of the right to vote shall include but shall not be limited to the application of any standard or procedures more stringent than are applied to others similarly situated, and the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise.

So they can still go ahead and give the examination. It doesn't outlaw any literacy test. But merely goes on to say—

If such person has not been adjudged incompetent, and has completed the sixth primary grade of any public school or an accredited private school, and so on.

Senator SPARKMAN. Yes, I recognize the fact that it does not set the sixth grade as a standard. I said that a few minutes ago. However, I said, that we know from legislative history—usually, where you suggest a ceiling, it usually becomes a floor, or where you suggest a floor it becomes a ceiling. It just works that way. You gravitate toward that. And I said it was suggestive to the States.

Senator ERVIN. Thank you very much. Thank you, Senator.

Senator SPARKMAN. Thank you very much, gentlemen.

Mr. CREECH. Mr. Chairman, our next witness is the Honorable Erwin N. Griswold, dean of the Harvard Law School, and a member of the U.S. Commission on Civil Rights.

Senator ERVIN. I wish to welcome you to the subcommittee.

STATEMENT OF ERWIN N. GRISWOLD, DEAN, HARVARD LAW SCHOOL, ON BEHALF OF THE U.S. COMMISSION ON CIVIL RIGHTS

Dean GRISWOLD. Thank you, Senator.

Senator Ervin and gentlemen, though I am dean of the Harvard Law School, I appear here of course, not for the school or the university, but for myself and as a member of the U.S. Commission on Civil Rights.

I appreciate the opportunity to appear here today to present the views of the Commission on Civil Rights on legislation designed to assure the right to vote free from racial discrimination. Although there are differences in detail, all of the bills pending before this committee are similar to a recommendation adopted unanimously by the Commission in its 1961 report on voting. That recommendation reads as follows:

That Congress enact legislation providing that in all elections in which, under State law, a "literacy" test, an "understanding" or "interpretation" test, or an "educational" test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education.

All of these measures are aimed at eliminating the use of literacy tests as a device for disfranchising citizens on racial grounds, an objective our Commission wholeheartedly supports.

THE NEED FOR LEGISLATION

Both the propriety and need for congressional action rest upon a finding, well-stated in the Mansfield-Dirksen bill, that "many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color" and that "literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote."

If this finding were unsubstantiated, there would be real basis for questioning the propriety and validity of the proposed legislation. But, unfortunately, both for the Negro citizens who have been victims and for the integrity of our democratic process, there is ample evidence that literacy and similar performance tests have been widely employed as a device for racial disfranchisement.

In a county in one State for example, a Federal district judge found that six Negro applicants (two with masters' degrees, five with bachelors' degrees and one with a year of college training) suffered racial denials of the right to vote on the specious ground that they could not read intelligibly or write sections of the State constitution.

In another State the Commission found that Negro applicants clearly able to read and write have been disqualified for misspellings, mispronunciations or for failing to answer frivolous questions entirely unrelated to literacy or to intelligent exercise of the franchise.

In a third State, where the Commission held hearings, it heard evidence that constitutional interpretation tests have been widely applied to require Negro applicants to answer questions which have long puzzled constitutional scholars.

At the same time, some States have amended their constitutions to impose more stringent registration qualifications. A 1954 provision in one State requires applicants to demonstrate a "reasonable understanding of the duties and obligations of citizenship under a constitutional form of government," a standard perhaps not unreasonable in itself but not required of those registered prior to 1954. This provision is a kind of modern-day "grandfather clause," its greatest impact being felt by the mass of unregistered Negro citizens.

Provisions such as these vest wide discretion in local registrars to determine the qualifications of applicants. And the Commission has received evidence that in many counties white applicants are entirely exempted or subject to pro forma tests of their qualifications before being registered.

The Commission found that in at least 129 counties in 10 States, where Negroes constitute a substantial proportion of the population (more than 5 percent of the population 21 and over), less than 10 percent of those ostensibly eligible are in fact registered to vote. In 23 of these counties in 5 States, indeed, not one Negro at all is registered. Since similarly populated counties in each of the same States have large Negro registration, the inference is unavoidable that some affirmative deterrent is at work in those counties where none are registered.

On the basis of this and other evidence, the Commission found that there were "reasonable grounds to believe that substantial numbers of Negro citizens are, or recently have been, denied the right to vote on grounds of race or color in about 100 counties in 8 Southern

States" and that some denials of the right to vote occur by reason of discriminatory application of laws setting qualifications for voters.

If existing laws were sufficient to deal with arbitrary or discriminatory denials of the right to vote, there would be no need for us to meet here today. But the fact is that, despite the notable progress made possible by the Civil Rights Acts of 1957 and 1960, there is no basis for believing that these laws will have any significant effect upon the discriminatory use of qualifications tests within the predictable future. In this connection, it is important to note that most of the cases filed under the 1957 act have been instituted since January 20, 1961, and that, of these 15 suits, only 5 have been even partially tried and 1 only in a period of 15 months has proceeded to a judgment vindicating the rights of citizens to register and vote. Where the problem lies not merely in isolated misapplications of the qualification laws but in the laws themselves, it is both appropriate and necessary to act directly through legislation.

Now I turn to the question of the constitutionality of these bills.

In my opinion and in the opinion of the Commission, the proposed legislation meets the test of constitutionality. I am submitting to the committee a Commission staff memorandum which rather fully discusses the constitutional argument, but I would like to outline briefly our position.

It is true that under article I, section 2 and the 17th amendment, basic control of qualification of electors is reserved to the States, subject, of course, to the power of Congress to protect its own elections. However, neither that State control nor any other power vested in Government, Federal or State, can be exercised in a manner inconsistent with rights guaranteed by the Constitution to our citizens. Preeminent among these guarantees are the right to equal protection of the laws specified in the 14th amendment and the right to vote free of discrimination on account of race or color specified in the 15th amendment.

And to these I would also add the provision of the 14th amendment relating to the privileges and immunities of citizens of the United States:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

That, too, seems to me to be a constitutional foundation for this legislation.

To vindicate these constitutional guarantees the Supreme Court has struck down grandfather clauses, the white primary, and various other devices employed to accomplish racial disfranchisement. Even more to the point, the Court in *Davis v. Schnell*, 336 U.S. 933, affirming 81 F. Supp. 872 (S.D. Ala. 1949), overturned a provision of State law requiring a citizen to "understand and explain" any article of the Constitution because the law had both a discriminatory purpose and was administered in a discriminatory manner.

The 14th and 15th amendments constitute not merely a direction to the courts to protect the rights of citizens to participate in the electoral process, but a broad grant of authority to Congress to fashion remedies appropriate to that end. Section 2 of the 15th amendment and section 5 of the 14th amendment, and I would add to those section 2 of the 13th amendment, because I think a very considerable historical

case can be made for the proposition that what we are dealing with here is really a vestige of slavery, which the 13th amendment abolished, and section 2 of the 13th amendment gave Congress the power to enforce that abolition.

Now, these provisions, taken together with article I, section 8, clause 18 (the necessary and proper clause) afford Congress wide scope to devise means for achieving the purpose of those amendments. Even if the power of the States to set voter qualifications was unqualified, it could not be exercised to achieve discrimination. The fact that a State has the power to draw political boundaries did not foreclose the Supreme Court in the *Tuskegee* case (*Gomillion v. Lightfoot*, 364 U.S. 339 (1960)) from limiting the use of that power to a legitimate, nonracial purpose.

It has been argued, of course, that this legislation is defective because it affects literacy tests which never have been used for racial purposes as well as those which have. But it is clear from the validation of the Fair Labor Standards Act, the National Labor Relations Act, the Federal Power Act, all exercises of the power given to Congress to regulate interstate commerce—the Corrupt Practices Act and other Federal legislation—that Congress possesses power to enact legislation pursuant to a granted power even though it may affect objects and persons outside the scope of direct Federal control.

If the proposed legislation sought to impair completely the power of the States to require that its citizens meet minimal requirements of literacy in order to vote, a more difficult question might be presented. But these bills would not accomplish such a result. By specifying a sixth grade education in a public or accredited private school, the legislation would merely substitute an objective means of determining a legitimate qualification for methods which are capable of, and indeed have been put to, discriminatory use.

Thus, the Commission is convinced that its recommendation and the proposed legislation based upon it is constitutional and can be enacted into law without recourse to the lengthy procedures and uncertain results involved in seeking to amend the Constitution.

Indeed, in my opinion, it is inappropriate to seek to achieve this result by a constitutional amendment. The Constitution as it exists today forbids discrimination on the ground of race, in voting as in all other matters, and it clearly gives Congress the power to enforce these nondiscrimination provisions by appropriate legislation. Thus, as I see it, the responsibility is on Congress now, and it is my view, shared by the Commission, that Congress should now recognize that fact, accept the responsibility, and enact appropriate legislation to make the already existing provisions of the 14th and 15th amendments effective.

We don't need more constitutional provisions. We need to make effective the constitutional provisions we already have.

I am not sure that any test, whether objective or not, can be devised to determine whether a citizen will exercise his vote in an intelligent manner. It may even be that there are illiterate persons in this Nation more capable of judging the candidates and the issues than some who have fully mastered the art of reading and writing. In fact, there are 30 States in this Nation which do not require literacy as a prerequisite for voting, and I would be hard put to say that the quality of the electorate or the government in those States is any way inferior to that of the 20 States which impose literacy requirements.

But, assuming that literacy is a reasonable, although inexact measuring rod, the Commission is convinced that any person who has completed six primary grades in public school or an accredited private school cannot reasonably be denied the right to vote on grounds of illiteracy or lack of sufficient education.

In most of the States, six grades are deemed to be the equivalent of a primary school education. A child who has completed this course ordinarily has mastered the fundamentals of reading and writing and been exposed to basic tutoring in history or civics. Recognizing this, the Bureau of the Census has deemed completion of 5 years of primary schooling the functional test of literacy, and in a 1960 report, says:

It was assumed in the survey that all persons with 6 or more years of formal education were literate.

It was on this basis that the Commission decided that as an objective standard, the sixth grade test would serve well.

I should emphasize though that the passage of this legislation will not necessarily solve the problem of racial disfranchisement. In 1959, the Census Bureau reported that 23.5 percent of nonwhites 25 years of age or more were functionally illiterate (had completed less than 5 years of school), compared to 6.4 percent of whites. Based upon Commission investigations, it may well be that many of the nonwhites in this category have been denied the right to vote not because they were in fact illiterate but because of the color of their skin. I am sure that many of these persons, despite formal lack of schooling, are able to meet the standards of a fairly administered literacy test. Nevertheless, the pending legislation would eliminate the worst abuses that have taken place under State law. At the same time, we should continue efforts to eliminate illiteracy itself.

In one significant respect, the Mansfield-Dirksen bill differs both from the Commission's recommendation on literacy tests and from S. 480 sponsored by Senator Javits. While S. 2750 applies only to Federal elections, the Commission's proposal contemplated that the objective standard of a sixth grade education would apply to Federal and State elections alike.

It is true that article I, section 4 vests in Congress the power to regulate the times, places, and manner of holding Federal elections and that this, along with article I, section 2, may constitute additional support for the passage of legislation to protect the integrity of the Federal electoral process. But basic support for the proposed legislation rests on the 14th and 15th amendments and on the power of Congress under these amendments to assure that no device, ingenious or ingenuous, will be employed to deny citizens the right to vote on racial grounds.

These amendments were designed to secure the right to vote free from discrimination in State as well as Federal elections. The major difference between the reach of congressional power to deal with Federal and State elections is that the former may be protected against incursions by individuals as well as persons acting under color of law. But that distinction is of no importance here, since the reform sought now would run only against governmental, no individual action. All of the people making decisions about registration are State officials acting under color of State law.

Congress as a matter of political judgment, may choose to go only halfway and limit its action at this time to Federal elections. This approach, however, may create some administrative difficulties. As Attorney General Rogers pointed out in 1960, in many States, Federal and State elections are held at the same time and the candidates appear on the same voting machine or paper ballots. Moreover, certain legal problems, for example, whether electors for President and Vice President are State or Federal officers, would have to be solved if States continued to apply subjective literacy tests to their own elections after legislation affecting Federal elections was passed.

In the opinion of the Civil Rights Commission, racial discrimination is constitutionally as well as morally objectionable whether it is applied to State or Federal elections. The Commission would, however, regard a measure limited to Federal elections as a significant reform, if that is all that Congress chooses to do at this time.

It is important, I think, to keep the potential gain to be derived from the proposed legislation in proper perspective. It will not be a panacea for all civil rights deprivations, even in the field of registration and voting.

Earlier I noted that measures establishing a sixth-grade standard for literacy will not affect discriminatory denials of the right to vote against literate individuals who lack the requisite formal education. These persons will still be compelled to rely upon lawsuits to secure their rights. Additionally, we must recognize that, based on long experience from the past, bills such as these will be a test of ingenuity rather than a complete remedy. These proposals can only restrict, not eliminate, the opportunities available for evasive or dilatory tactics.

Finally, it should be recognized that the right to vote may be impaired indirectly by inadequate educational opportunity or by economic dependence stemming from lack of equal employment opportunity.

These are other areas of discrimination with which these bills, appropriately enough, do not undertake to deal. The bills involve only a step in dealing with the whole problem. But they would be an important, useful, and significant step in the right direction. They would help to eliminate one of the most flagrant abuses of constitutional rights, and they would be a clear recognition of the responsibility of Congress in this area. For these reasons the Commission favors the passage of the pending legislation.

Thank you, Mr. Chairman.

Mr. CREECH. Dean Griswold, I realize that you were not a member of the Commission on Civil Rights in 1959. However, I am certain that you are aware of the report made by the Commission in that year. It was recommended by the Commission in 1959 that a constitutional amendment be adopted to accomplish substantially the same objectives of the 1961 Commission recommendations.

What court decisions have occurred since 1959, during the last 3 years, that would cause a reversal of the position taken by the Commission in 1959?

Dean GRISWOLD. Well, I wouldn't want to claim too much, Mr. Creech, but I became a member of the Commission since 1959. Mr. Robinson also became a member of the Commission since 1959. There

has been opportunity for further consideration of the matter, and at a meeting of the full Commission held last August, the matter was thoroughly canvassed, the legality and the constitutionality of the legislation was explored quite conscientiously, and as a result of that, the Commission unanimously voted in favor of the sixth-grade standard as an appropriate legislative test to be enacted by Congress under the constitutional power already given to Congress by the various clauses to which I have referred in the 13th, 14th, and 15th amendments.

Mr. CREECH. Would you agree, sir, that by the same token, the membership of the Commission in 1959 also explored this matter conscientiously, and that its recommendations were also based upon extensive exploration and study of the problem?

Dean GRISWOLD. I have no doubt of that. They simply did not choose at that time to go as far as they might have gone. The Commission, based on further information, indeed, from some of the hearings—the hearing in Louisiana was not held until 1960—and having more concrete information of the use of various tests to deny the right to vote for discriminatory reasons—came to the conclusion, in the summer of 1961, that it was constitutional for Congress to enact these statutes, and that it should so recommend. And it did unanimously, including four members of the Commission who were members at the previous time.

Mr. CREECH. Is it not a fact, sir, that, in its 1959 report, at least one or more of the Commissioners indicated that after careful study and deliberation, it was their feeling that any attempt to change voter qualifications, except by constitutional amendment, would be unconstitutional?

Mr. GRISWOLD. I can't tell you that. I do not recall what position individual members took. I do know the Commission recommended a constitutional amendment in 1959. I also know that two members of the Commission in 1961 did not join in the first recommendation, which goes beyond the sixth grade school provision. I do not understand, however, that their vote against that recommendation was based on constitutional grounds, but rather on their judgment as to what was the appropriate recommendation, all things to be taken into account, as to the extent to which Congress should exercise its power under the existing constitutional provisions.

Mr. CREECH. On page 2 of your statement, sir, paragraph 1, you state that the propriety and need for congressional action rests upon a finding that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote.

I should like to inquire, sir, how does this purported finding on the basis of such a recommendation support the Supreme Court's statement in the decision of *Lassiter v. Northampton County Board of Elections*, handed down in 1959, in which the Court said there is "a wide scope for exercise of State jurisdiction over standards which a State may require of voters," and that "literacy and illiteracy are neutral on race, creed, color, and sex, as reports from around the world show."

Dean GRISWOLD. I am not sure I get all of your question, but let me try to give a response and then you ask me anything that I do not cover.

The *Lassiter* case involved a State statute enacted in a situation where Congress has not spoken, which is the present situation, with respect to literacy requirements.

Congress has not undertaken to exercise in that field the power which has been granted it under the appropriate clauses of the 13th, 14th, and 15th amendments.

This, it seems to me, is a little bit like an analogy that I can draw in the area of interstate commerce. The Constitution gives Congress power to regulate commerce among the several States.

Now, Congress exercises that power in some respects and does not exercise it in others. One might think that in modern times, Congress had reached about as far as it can in all directions, but of course it has not covered everything and historically it did not.

And we had for a long period, and we still have to some extent, a question of the powers of the States with respect to interstate commerce where there is what has been called by the Supreme Court "the silence of Congress."

When Congress is silent, the States can do various things with respect to interstate commerce. When Congress speaks, the State legislation falls aside.

Now, it seems to me that that analogy applies to the *Lassiter* case. The *Lassiter* case arose with respect to a situation where Congress was silent. When Congress is silent with respect to a literacy test in a State, the States have power to enact legislation.

If those literacy tests are administered in a nondiscriminatory fashion, no constitutional amendment is violated.

However, once Congress does exercise its power under the amendments, then the State legislation which is inconsistent therewith would fall aside, just as State legislation with respect to interstate commerce falls aside when Congress exercises its power to regulate interstate commerce.

I do not know if that is a direct answer to the question you asked but that is the general approach I would take to answer your question. But the Congress has constitutional power to speak, and if Congress did speak under its constitutional power, then the State legislation upheld in the *Lassiter* case would fall aside.

(Senator Keating entered the hearing room at this point in the proceedings.)

Mr. CREECH. Dean Griswold, on page 5 of your statement, you cite cases where the Supreme Court has struck down, for instance, the "grandfather clause" and the white primary and various other devices which it found were employed to accomplish racial disenfranchisement.

You note that in the *Schnell* case, the courts overturned a State literacy examination because it was found that it was administered in a discriminatory manner.

Sir, these decisions were handed down by the courts on a case-by-case basis and when it was felt that there had been sufficient proof presented in each case to show violation of the 14th and 15th amendments. But how can such individual rulings support legislation designed to remove from all of the States in one fell swoop their broad constitutional power over voter qualification?

Dean GRISWOLD. It seems to me it is simply a question of the extent to which Congress chooses to exercise the power which the Constitution already gives to it, and has for 100 years, to enforce the Constitution.

My own view is that the Congress has long been too slow in moving into this area. When Congress does not act, of course, the States have to act. But if Congress would exercise what I believe is its responsibility under these constitutional provisions, then any State provision which was inconsistent with the enactment of Congress would necessarily have to fall aside, as I have indicated, just as many State provisions with respect to interstate commerce have been perfectly valid when enacted, but when Congress thereafter exercised power to regulate interstate commerce, the State provisions fell aside.

Mr. CREECH. Sir, you say that the power to regulate the voter qualifications has been a power which was conferred on Congress for over 100 years; is that so?

Dean GRISWOLD. No; I did not say that, Mr. Creech, what I said was the power to legislate against discrimination. All we are talking about here is voter qualification standards which, if Congress enacts the bill, the Congress would find, and I believe on ample evidence, have been widely used to carry out racial discrimination in voting.

Mr. CREECH. Now, sir, no less authority on the subject than a former Member of the Senate, a former Speaker of the House of Representatives at the time that these constitutional amendments were enacted, the late James G. Blaine, has said—

The 15th amendment now proposed did not attempt to declare affirmatively that the Negro should be endowed with the elective franchise, but it did what was tantamount to forbidding the United States or any of its States the power to abridge or deny the right to vote on account of race, color, or previous condition of servitude. States which should enact tests or proper qualification might still exclude a vast majority of Negroes from the polls, but they would at the same time exclude all white men who could not comply with the test which included the Negro. In short, suffrage by the 15th amendment was made impartial but not necessarily universal to male citizens above the age of 21.

Dean GRISWOLD. I think I would say for one thing that the Senator and former Speaker and former ex-Presidential Candidate Blaine did not have the benefit of a very large amount of subsequent experience which we have had, which shows that these particular literacy requirements are in fact used for the purpose of discriminating in voting.

Mr. CREECH. Sir, are you saying that subsequent experience mitigates against the original intent of Congress when it passes legislation.

Dean GRISWOLD. No; not at all. I am simply saying that what Senator Blaine said was that the 15th amendment, if fairly applied, would not prevent a State from using a fairly applied literacy test if Congress did not choose to exercise the power which is granted to enforce the 13th, 14th, and 15th amendments.

Subsequent events have shown very clearly, I think, that State literacy tests do in many States provide a basis for racial discrimination. It seems to me, therefore, perfectly appropriate in the situation as it now exists, that Congress should exercise the power which it has and which has been granted to it, and which, in my view, it is the responsibility of Congress to exercise.

Senator KEATING. Mr. Chairman, could I interrupt a moment?

Senator ERVIN. It is all right with me if it is all right with the dean and Mr. Creech.

Senator KEATING. May I inquire whether it is intended that Dean Griswold will be on this afternoon also?

My reason for inquiring is this: The clergyman who is offering the prayer at 12 o'clock is from New York and a friend of mine and I feel I must be on the floor at 12 noon. I had a few questions I wanted to put to Dean Griswold.

I do not want to interfere with the continuity of Mr. Creech's inquiry, but if Dean Griswold is to be here this afternoon, I could be back.

If not, I would ask the privilege of putting these few questions to him now.

Senator ERVIN. I would suggest that you ask them. I think the dean will be here early this afternoon.

Dean GRISWOLD. Mr. Chairman, I would like very much to get a 3:30 plane. Until that time I am entirely at the committee's disposal.

If I may say so in the presence of these two Senators, the reason is that there is a student law club dinner tonight at which I have long promised to speak and I would like not to break the engagement if I could avoid it.

Senator ERVIN. I will do all I can, but I should say in all fairness, that since I have a great veneration for the Constitution of the United States and I think I am engaged in defending the Constitution of the United States, I have a great many questions I want to ask you.

Dean GRISWOLD. I am at your disposal. I have stated the fact of what I would like to do. If that is not convenient——

Senator ERVIN. I will do all I can to get you to it. But I do think I am trying to save the Constitution of the United States for the benefit of all Americans of all races and all generations, and I think there are quite a few questions I should ask you.

Dean GRISWOLD. Thank you.

Senator ERVIN. I thank you.

Senator KEATING. The two members sitting on this committee now should be very sympathetic to the dean's desire to get to the law club meeting, because if there is nothing else, and there are many other things that the distinguished chairman and the Senator from New York have in common, it is that they are both proud of being graduates of Harvard Law School.

We both want to cooperate in any way we can with the chairman. But I would be very happy, if the chairman thinks that he will be here at 2 o'clock, I will be very happy to defer my questions until after this defense of the Constitution.

Senator ERVIN. I would say to the Senator from New York, if he wishes to go and listen to the prayer, that I would not deter him from that at all, and I would suggest that he proceed.

The Senator from New York may not be standing in the need of prayer, but I honestly believe the Constitution of the United States is.

Senator KEATING. It might be good for both of us to hear both the dean and the clergyman. But I shall return. He does not have to leave until 3:30, anyway. My questions will be short, and I was very sorry not to hear Dean Griswold's presentation. But I shall read his statement with great interest because of the great respect I have for the witness. I will return at 2 o'clock, if I may.

Mr. CREECH. Dean Griswold, I shall try to move quickly with these questions. I do have several others I would like to ask.

On page 4 of your statement, you indicate that existing laws are not sufficient to deal with arbitrary and discriminatory denials of the right to vote and that there is no basis for believing that present laws will have any significant effect upon the discriminatory use of qualifications tests within the predictable future.

Sir, I should like to ask: What then are the advantages of the enforcement procedures in this legislation over the present laws, if a registrar challenges a voter's sixth grade education? Will he still not have to go into court and perhaps become involved in lengthy litigation?

Dean GRISWOLD. Yes, Mr. Creech; he may be if the registrar chooses to operate on that basis. However, it seems to me that in most cases, the existence of a sixth grade education is susceptible of documentary and clear and incontrovertible proof. The remedy in court will be much quicker and if it is shown that there is a systematic pattern of—is that the phrase—Mr. Bernhard?

Mr. BERNHARD. Pattern or practice.

Dean GRISWOLD. A systematic pattern or practice of discrimination. Then, under the existing Civil Rights Act, steps can be taken to terminate that way of dealing with this problem.

Under the literacy test, it is an individual matter, person by person, involving a great deal of judgment, particularly when it is an explain-or-interpret-the-Constitution provision, as to which there is no clear or convenient external objective, documentary test.

It seems to me it is a little bit like the provision with which we are all familiar: one reaches his majority when he is 21 years old.

We all know people who are just as competent 5 days before they are 21 as they are 5 days after, but they become legally competent at the fixed point because that is objectively determinable and it greatly minimizes the factual determination and the controversy which would arise if some government functionary had to have every individual appear before him and he finally said, "Well now, you are competent," and the people who were found not competent then had to go to court and litigate.

It is our view that this provision would be a step, a help, toward simplifying this process and toward minimizing the existing racial discrimination in voting under color of literacy tests.

Mr. CREECH. Sir, I would like to ask some questions pertaining to the memorandum which accompanied your statement.

The statement on page 5 of the Commission's memorandum, that Congress has the power to protect Federal elections from racial discrimination, may be true, but according to *Ex parte Yarbrough*, this power does not arise, does it, until the class of voters who are qualified has been determined by State law?

In other words, the State law decides who shall be the voters, does it not, sir?

Dean GRISWOLD. In the absence of action by Congress under the clauses giving the Congress power to enforce the 13th, 14th, and 15th amendments, then it is the State law which determines the class who can vote.

But if the Congress chooses to exercise those powers, which I think it should, then it may be the Federal power which restricts or limits or qualifies State power to determine those classes, as long as it is Federal law which is rightly based on the enforcement of those provisions—that is, the maintenance of privileges and immunities of the citizens of the United States in matters of discrimination.

May I point out that the memorandum is a staff memorandum, not mine. I do not disassociate myself from it; on the other hand, if it were mine, I would put in some things——

Mr. CREECH. I want to ask, sir, for purposes of the record, if you would care to put the memorandum in your own language?

Dean GRISWOLD. That would take a——

Mr. CREECH. I do not mean at this time, sir.

Dean GRISWOLD. That I have tried to do in my testimony this morning; in my statement this morning.

Mr. CREECH. I see.

Dean GRISWOLD. I think the chief difference with me is that there are some places in the staff memorandum which seem to me to raise doubts which I do not, myself, entertain. But I suspect that was because the staff members were trying extremely hard to be fair and objective in preparing it.

Mr. CREECH. Sir, on page 9, it says, under the section on the “necessary and proper clause”:

It is reasonable to conclude that the States’ rights to prescribe voter qualifications cannot be exercised in any area defined by the limitations of the 14th and 15th amendments.

Then it goes on to say:

Difficulty arises from the fact that in many States whose voter qualification laws will be affected by the bill, there has been no discrimination.

I would like to inquire, sir, if this is not refuted by cases such as the *Lassiter* case, in which the court has said that literacy tests which are reasonable are constitutional.

Dean GRISWOLD. In the silence of Congress, to use the well-known phrase in the law of interstate commerce.

Mr. CREECH. Sir, I realize that you have directed your statements primarily to S. 480 and S. 2750. S. 2979 embodies the recommendations of the Commission, in that it would limit voter qualifications by the States to four specific areas; that of age, residence, legal confinement, commission of a felony.

Now, with regard to that bill, sir, inasmuch as it would change the voting laws in 90 percent of the States—in other words, 45 States would be affected by this bill if it were enacted—I should like to ask, sir, what is the constitutional basis for the Commission’s recommendation which was adopted in this bill?

Dean GRISWOLD. Here, though it is the Commission’s recommendation, I should like to make plain that this is by a vote of four members of the Commission, with two dissenting insofar as the first section of S. 2979 is concerned. As far as I am concerned, I was one of the majority, and the constitutional basis is exactly the same as in the case of the other bills to which we were referring.

The power rests primarily on the power of Congress to enact legislation enforcing the 13th, 14th, and 15th amendments, and to some extent, on the power of Congress to regulate the time, place, and man-

ner of holding elections. It seems to me that this, as in many other matters, as again in the case of interstate commerce, is simply a question of how far Congress thinks it is necessary or desirable to go.

Section 1 of the Keating bill goes much further than section 2, which is the literacy test.

Personally, I think the Congress has power to and ought to go as far as section 1.

I recognize that that is a fairly big bite at this time and I would be content for the time being if Congress would go as far as section 2. But as far as I am concerned, the constitutional power is exactly the same with respect to both provisions.

Mr. CREECH. Sir, I am sure that you are aware that there are many States throughout the country which require prospective voters to take loyalty oaths or else disqualify dishonorably discharged servicemen, or have a number of other voting requirements which we mentioned this morning.

I wonder, sir, is there any evidence which the Commission has that these requirements are used to discriminate on the basis of race?

Dean GRISWOLD. I know of no such evidence with respect to, let's say, loyalty oaths or dishonorably discharged servicemen. Actually, myself, if the Congress were seriously to consider the Keating bill, which I would be glad if it would do, it seems to me it would be most appropriate to hold hearings as to just what provisions in State laws can be maintained without affecting discrimination, and what ones ought to be eliminated. It does seem to me that there is much to be said for the clear simple statement of the right to vote in this great American democracy which is contained in the Commission's recommendation and carried forward in Senator Keating's bill, but I would not myself say there could not be three, four, or five other provisions added there which would have no bearing on the question of discrimination.

I would like not to have too many, because pretty soon you get into provisions which, though perhaps innocuous on the surface, do in fact lend themselves to discriminatory administration.

Mr. CREECH. And you feel that the bill could be amended to allow such State laws as those now existing which disqualify idiots and insane persons who are not legally committed?

Dean GRISWOLD. Yes; I would think so; although the word "idiot" is a pretty strong one.

Mr. CREECH. I am just quoting the statutes, sir.

Dean GRISWOLD. Yes; I know. If it just said "people of low intelligence" or something of that kind, I would be greatly concerned as to how it is administered.

Mr. CREECH. I think the statute of California says that.

Dean GRISWOLD. Yes; I think there could be half a dozen things which might be in that which could enlarge the field in which the States could operate.

Mr. CREECH. I was interested in your comment on the assertion by the Massachusetts Supreme Court approximately 100 years ago. It is a quotation which has been frequently cited since.

Dean GRISWOLD. This is the school case in Massachusetts?

Mr. CREECH. No; I am thinking about *Stone v. Smith*.

Dean GRISWOLD. I am not familiar with it.

Mr. CREECH. In that case, the court said that Massachusetts had a literacy test for the purpose of insuring an independent and intelligent exercise of the right of suffrage.

I notice, sir, that you still have a literacy test in Massachusetts, among other disqualifications for voting.

Dean GRISWOLD. That is my understanding.

Mr. CREECH. Would you feel, sir, that a literacy test as such, for the purpose of insuring an independent, intelligent exercise of the suffrage, is not desirable?

Dean GRISWOLD. I think that a century of experience in this country has shown that literacy tests are primarily used today for the purpose of racial discrimination and, that being the case, it seems to me that Congress should exercise its power under the 13th, 14th, and 15th amendments to eliminate that.

Mr. CREECH. I have just one last question, sir. I would like to ask you for your views on this representation to the subcommittee with regard to the provisions of 2750. According to some statements which we have received, 2750 clearly denies to others similarly situated due process of law under the fifth amendment. In other words, it denies to citizens of the United States who speak other foreign languages and who do not speak English the same right to vote that the bill grants to citizens who speak Spanish. If the bill grants the favor to one foreign language group to the exclusion of others, it would clearly be a violation of the equal protection of the laws implicit in the fifth amendment. The finding of fact in paragraph E is unconstitutional according to these statements.

I wonder, sir, if you would care to comment on that assertion.

Dean GRISWOLD. Mr. Creech, I find the provision with respect to Spanish language much more difficult than the others. I would point out, though, that as far as I know, there is no place in the United States where any language other than English or Spanish is the official language.

Now, the Commonwealth of Puerto Rico is a part of the overall United States. I know that the relationship is complicated; it is a free and associated commonwealth. I think it is a very fine arrangement which has evolved to take care of that situation. But the citizens of Puerto Rico are citizens of the United States and their natural and local language is Spanish. A great many of them come to the United States, as they are freely entitled to do as citizens of the United States, and it seems to me that a case can be made for the proposition that a person who is literate in a language which is official in a part of the United States should be entitled to vote. If Congress chooses so to legislate under the powers granted to prevent discrimination, and to regulate some aspects of Federal elections, such legislation should be valid.

Now, you refer to other languages, but for the moment I know of no place in the United States where French or German or Chinese or Russian is the official language.

If this were Canada, I would suppose it would be taken as a matter of course that a person in any part of Canada who was literate in either English or French could not be discriminated against as to voting.

Now, here, Puerto Rico is offshore and small. But nevertheless, it is part of the United States and Spanish is its official language and it

would seem to me that if Congress in its wisdom, in the exercise of its power to regulate Federal elections, chose to say that a person who is literate in the Spanish language could not be denied the right to vote, that that would be a valid legislative enactment, although I would point out that this is not recommended by the Commission.

The Commission did not recommend against it, either, but it is not one of the Commission's recommendations, and I recognize that this is a harder question than the sixth grade one which is the backbone of the Commission's recommendation.

Mr. CREECH. I just point out there, in passing, sir, since you mentioned the fact that you are not familiar with other official languages, that, of course, the Navajo Indians, who vote, are good citizens of the United States and have a large reservation the size of West Virginia, where the official language is Navajo, and all their assemblies are conducted in Navajo.

As you have mentioned, in Louisiana, there is still the provision that if a voter is literate in his mother tongue, whatever that might be, he would be qualified for voting.

Dean GRISWOLD. I would have no objection, myself, to legislation of Congress which said that Navajos, at least when within their area, who were literate in the Navajo language, could vote.

Mr. CREECH. Since you say "within their area," would you limit it to Puerto Ricans who are in Puerto Rico?

Dean GRISWOLD. No, I would not.

Mr. CREECH. Would you print all the ballots throughout the United States in Spanish?

Dean GRISWOLD. No; I have no objection to printing the ballots in New York or elsewhere in English. The only question is the qualification of the voter to vote at the election.

After all, the ballots consists primarily of names. The man has to have at least a sixth grade education. I believe all of the States have provisions under which a blind person, for example, can be aided in voting, and it would not be too difficult for a State to provide that one of the election officials could translate for a person who was literate in Spanish, but not literate in English, if he could not read the provisions on the ballot.

It might be a little hard if we extended that to Navajo.

Mr. CREECH. Thank you very much, Dean Griswold.

Senator ERVIN. Dean, do you agree that the Supreme Court has said in many cases that one of the most fundamental ways of interpreting the Constitution is to determine the intent of those who framed it and those who ratified it?

Dean GRISWOLD. That is one of the ways, Senator; yes; not the only way.

Senator ERVIN. Well, I call your attention to the fact that in the famous Federalist No. 60, Alexander Hamilton was dealing with the belief that if the Constitution was ratified, the Federal Government would come under the control of the rich to the detriment of the great mass of the people.

In answering this contention, Alexander Hamilton said this:

The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property, either for those who may elect or be elected, but this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the

regulation of the times, the places, the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature.

Now, I construe the word "legislature" there in its context, as referring to the Federal Legislature, which is Congress. Do you not think that is about as clear a statement as could be made, as far as Alexander Hamilton was concerned, that the right to prescribe qualifications was vested solely in the States or intended to be vested solely in the States?

Dean GRISWOLD. I have no doubt about that whatever, Senator, as applied to the Constitution about which Alexander Hamilton was talking. This was three-quarters of a century before the 13th, 14th, and 15th amendments were adopted, and I am sure Alexander Hamilton was not adverting to them when he made that statement.

I point out that the foundation of my views on this bill rests entirely on the powers granted to the Congress by the 13th, 14th, and 15th amendments.

Senator ERVIN. But you do agree with me that that was a correct interpretation of the Constitution which Alexander Hamilton, in this article, was asking the people of this country, the States, to ratify.

Dean GRISWOLD. Yes, Senator; if the 13th, 14th, and 15th amendments had never been adopted, I very likely would not be here today.

Senator ERVIN. Well, I would like to ask you if another one of the primary tests to determine what a constitution means is not to study the language of the constitution, and if it is not well established that where the language is clear, there is no room for construction?

Dean GRISWOLD. It is so said, but the question is, When is the language so clear that there is no room for construction? That is not entirely clear.

Senator ERVIN. I will read you section 2 of article I:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Do you think there is any ambiguity in that section?

Dean GRISWOLD. That, Senator, is the Constitution as it was written in 1789. There is some more of the Constitution that was written in the 1860's, which seems to me to be a distinct qualification of the language to which you referred.

As I said with respect to the Alexander Hamilton quotation, if we had only that language, I very likely would not be here today.

Senator ERVIN. Let me ask you another question. Except insofar as this language which I have just read to you of section 2 of article I may have been affected by the 13th, the 14th, the 15th, or the 19th amendment, does it not still stand in full force and effect?

Dean GRISWOLD. Yes; I think so.

Senator ERVIN. Now, I will read the relevant part, as I see it, of the 17th amendment:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Now, that was put in the Constitution, became a part of the Constitution, if I remember right, in 1913.

Dean GRISWOLD. I think it was about then, Senator.

Senator ERVIN. And that was subsequent to the adoption of the 13th, the 14th, and the 15th amendments, was it not?

Dean GRISWOLD. That is true, but I have never heard it suggested that that language was intended to or did in fact repeal the non-discrimination provisions of the 13th 14th, and 15th amendments.

Senator ERVIN. Do you agree with me in the proposition that the Court held in the *Yarbrough* case that section 2 of article I prescribed the qualifications for electors of Senators and Congressmen as added to by the 17th amendment?

Dean GRISWOLD. I am sorry, Senator; I am afraid I do not understand the question. I was trying to recollect the *Yarbrough* case and I am afraid I have lost the thread of your question.

Senator ERVIN. I understand a lawyer might have difficulty because he cannot carry all the cases in his head.

In the *Yarbrough* case, which is reported in 110 U.S. beginning at page 651, the Court says, quoting first:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States and the electors in each State shall have the same qualifications requisite for electors in the most numerous branch of the State legislature (art. I, sec. 2).

The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election of Members of Congress. Nor can they prescribe the qualification for voters for those ex nomine. They define who shall vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress.

Do you not consider that that is a direct interpretation of section 2 of article I of the Constitution? Incidentally, that decision was handed down in 1884, which was after the 13th, 14th, and 15th amendments were adopted.

Dean GRISWOLD. Oh, yes; and that involved private action by citizens who were not governmental officers. And it was also, in the phrase which seems to me to be of very great importance here, "in the silence of Congress," Congress having taken no action with respect to the matter. What we are trying to consider here is whether Congress should take action with respect to the matter.

Senator ERVIN. But in the *Yarbrough* case, I believe it involved the Enforcement Act of 1870, and I think—you probably have it confused with some other cases—I think the *Yarbrough* case sustained the power of Congress to act as to the manner of conducting an election.

But as I construe it, it pointed out, in effect, in speaking of qualifications, the distinction between the prescribing of the qualifications for voters in section 2 of article I and the right to regulate the times and the places and the manners of holding elections under section 4 of article II.

Dean GRISWOLD. I agree with that, but as I understand it, there was no question present or decided in the *Yarbrough* case as to the power of Congress to enact legislation to eliminate discrimination in State and Federal elections.

Senator ERVIN. No; but it did state, did it not, that under the Constitution of the United States, the persons who were entitled to vote for

Representatives were the same persons as were eligible to vote for members of the most numerous branch of the legislature of the State in which the election was being held?

Dean GRISWOLD. That is what article I, section 2 provides, and the only qualification I know is that provided by the 13th, 14th, and 15th amendments.

Senator ERVIN. Maybe we can simplify this, Dean Griswold. Do you agree with me in the constitutional proposition that the power to prescribe the qualifications of voters is still controlled by section 2 of article I of the Constitution insofar as it has not been limited by the 13th or the 14th or the 15th or the 19th amendments?

Dean GRISWOLD. And insofar as Congress has not validly enacted legislation under the other clause of the Constitution giving Congress power to regulate the time, place, and manner of Federal elections.

Senator ERVIN. Let us see if we can clarify that.

Do you take the position that the power of Congress to regulate the times of an election has anything to do with the prescribing of qualifications of voters?

Dean GRISWOLD. No.

Senator ERVIN. Well, do you take the position that the power of Congress to regulate the places of elections has anything to do with the qualifications of the voter?

Dean GRISWOLD. It might. It might. If, for example, the State provided that all elections should be held in an exclusively white area and the social pattern and tradition was that no Negro ever entered that area, then it seems to me that Congress might validly pass statutes affecting the place of holding elections.

Senator ERVIN. Well, Dean, do you not think that if Congress had such power, it would derive the power from the 13th, the 14th, or the 15th amendments, rather than from section 4 of article II?

Dean GRISWOLD. No; I think the particular one we referred to might get the power from both. If it was a question of discrimination, it could also get it from the 13th, 14th, and 15th, but it also seems to me that comes within the power of Congress to regulate the place of holding elections.

Senator ERVIN. Do you take the position that the power of Congress to regulate the place of holding elections is synonymous with regulating the qualifications of voters?

Dean GRISWOLD. No; I simply say Congress has power with respect to place. It does seem to me that a State could pass a statute stating that elections should be held in some very remote, inaccessible place, and Congress could pass a statute saying, "No, congressional elections shall be held generally."

Senator ERVIN. I do not have any trouble with that, because I do not think you have to go to racial discrimination for that.

Dean GRISWOLD. I agree.

Senator ERVIN. Because section 4 of article I says that Congress shall have the paramount authority to regulate the times and the places and the manner of holding elections.

Dean GRISWOLD. I agree.

Senator ERVIN. Now, to sum it all up, do you contend that the power which is vested in Congress by section 4 of article I confers upon the Congress any power to supersede, perhaps to prescribe, the qualifications of voters for Representatives or Senators?

Dean GRISWOLD. I am not quite clear how far the power of Congress to regulate the time, place, and manner of holding Federal elections goes; as far as I know, there is very little decision or interpretation of it. "Time" is pretty clear, I think. "Place"—I have pointed out some problems. "Manner"—I do not quite know just what "manner" means. "Manner" might include the procedures leading up to the election, including registration. I think it is further than any court decision now goes, but I would not want to say that that could not be found in the word "manner."

Senator ERVIN. Well, would not the word "manner"—in this ordinary significance—mean mode, way, procedure, in which you can do something?

Dean GRISWOLD. Well, I think I could write a brief which presented some authority that the word "manner" had a somewhat broader meaning than that. Whether I would be convinced by the brief after I had written it, I do not know; I would have to work at it.

Certainly I think that "manner" covers such things as the secret ballot, for example.

If the State provided that all votes should be cast by the voter coming in and saying audibly whom he voted for, I think that Congress, under the power to regulate the manner of elections, could say, "No, it must be by secret ballot."

Senator ERVIN. I agree with you on that. I think as a matter of fact there are a number of decisions which inferentially define the powers of Congress under this.

They all say, in effect, that the manner of holding an election is the right to regulate the casting, the counting and returning and circulating of the ballots.

Dean GRISWOLD. I think it is perfectly accurate to say that Congress has followed that with regard to the exercise of the power. I do not think there is anything that says Congress cannot go beyond that.

Senator ERVIN. I think we agree on the proposition, so I will go no further.

Dean GRISWOLD. Let me say, Senator, I find "time, place, and manner" a very slender reed to stand on for this. It is the 13th, 14th, and 15th amendment provisions which seem to me to be the important ones here. I simply want to say maybe there is something in "time, place, and manner" and whatever it is, I do not want to throw it away.

Senator ERVIN. Whatever it is, you have not been able to find it, have you?

Dean GRISWOLD. I see some glimmers.

Senator ERVIN. You do not know of any decision of any Federal court that would indicate that section 4, article I, gave the Congress any power to modify the qualifications of electors of Representatives as created by section 2 of article I, do you?

Dean GRISWOLD. No, I do not know of any.

Senator ERVIN. Well, Dean, we go then to these amendments. I certainly agree with you. You have not quite made yourself irrevocable to the position, but I certainly agree to the proposition that there is nothing whatever in the Constitution that would give Congress the power to act unless it could be found in the 13th or the 14th or the 15th or the 19th amendments. That is my position.

Dean GRISWOLD. Yes; and I would eliminate the 19th amendment from what we are talking about. That is another problem. So that for all practical purposes, the constitutional foundation of the legislation before the committee must be found in the 13th, 14th, and 15th amendments. If it cannot be found there, it would be very hard indeed to find it any place else.

Senator ERVIN. Now, the 13th amendment to the Constitution reads as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Do you seriously contend that the power of Congress to adopt legislation to enforce the outlawing of slavery has any relation the qualifications of a man to cast a ballot?

Dean GRISWOLD. Yes.

Senator ERVIN. Well, would you mind telling me what your definition of slavery is?

Dean GRISWOLD. I find it easier to rest on the 14th and 15th amendments, but as I interpolated in my opening statement, it seems to me tolerably clear as a matter of social history of the United States that the discrimination which exists on the ground of race in a number of States with respect to voting and other matters is a direct descendant of slavery as an institution in the United States.

Now, in between slavery and denial of the right to vote, there is peonage. Congress has passed legislation with respect to peonage, which is something different from slavery.

Senator ERVIN. But involuntary servitude, did it not hold, is peonage?

Dean GRISWOLD. Yes; to some extent; and there may be some involuntary servitude in not being able to vote, not being able to have a voice in choosing who your government is and whether you will have a road go by your house and the other things involved in that.

Senator ERVIN. You take the position, in other words, that a Negro could, somehow under the 13th amendment, pay somebody to build a road by his house?

Dean GRISWOLD. If he could vote, he could have a voice in whether a road is built by his house. If he cannot vote he has no voice at all.

Senator ERVIN. Do you take the position that the 13th amendment has anything whatever to do with the building of a highway, or whether a man could drive on a highway?

Dean GRISWOLD. I take the position that the 13th amendment has something to do with whether a person is a full citizen of the United States or not.

The right to vote is an element of being a citizen of the United States, subject only to limited and reasonable qualifications, such as conviction for crime and things of that sort.

Senator ERVIN. Is not the ordinary meaning of the word "slavery" that it represents the power of one man to demand the personal services of another against the will of the latter?

Dean GRISWOLD. Senator, I did not say this was slavery; I said it was a vestige of slavery. I will stand by that. I think it is a vestige

of slavery. I think historians and sociologists would quite generally agree with that.

Senator ERVIN. Well, this does not give Congress the power to enact legislation against the vestiges of slavery. It only gives it power to enact legislation against slavery and involuntary servitude.

Dean GRISWOLD. And Congress shall have the power to enforce this, to make sure that slavery and all its attributes are eliminated.

Senator ERVIN. It does not say that.

Mr. GRISWOLD. It says Congress shall have the power to enforce this amendment.

Senator ERVIN. Do you not know the Supreme Court has determined that it did not give a man the right to vote; it just gave him the right to end his involuntary servitude to another?

Dean GRISWOLD. I agree. I am talking about the validity of a statute which Congress might choose to enact under section 2 of the 13th amendment. As far as I know, there is not now and never has been such a statute, sir, relating to voting.

Senator ERVIN. There has never been a decision of the Court indicating that the word "slavery" or "involuntary servitude" could be construed to have that wide a meaning. Has there?

Dean GRISWOLD. Senator, I would rather rest on section 14 and section 15. I am only saying that section 13 is relevant.

Senator ERVIN. Well, would you take the position that amendment 13 in and of itself was sufficient to support the constitutionality of any of these bills?

Dean GRISWOLD. No; if we had only amendment 13 and article I, section 2, I would think we had very thin ground to stand on. But I do think that amendment 13 is not irrelevant in construing and evaluating the overall powers which were granted to Congress as the result of the holocaust of the 1860's.

Senator ERVIN. Well, at least we are almost in agreement.

You agree that the foundation would be awfully thin, and I take the position, with all due respect, that there would be no foundation at all.

Dean GRISWOLD. All right.

Senator ERVIN. So let's not spend any more time on that proposition.

I just wonder if this bill, S. 480, is not a little broader than the objective that the Commission has in view.

If I could just relax a minute, when President Kennedy was raiding the faculties of Harvard University and the law school for men to come to Government, I read, or heard, of a statement that you made to the effect that old deans do not die, they merely lose their faculties.

Dean GRISWOLD. You are suggesting that is the position I am in here now?

Senator ERVIN. I am not speaking of you since you are not an old dean, of course.

Do you have a copy of S. 480?

Dean GRISWOLD. Yes, Senator, I do.

Senator ERVIN. I would like to ask this now. There are some States that disqualify a person for voting on the ground of insanity, even though his insanity has not been adjudged. I am going to leave out some words. I construe this in the disjunctive rather than in the conjunctive and I am going to try to read it on that view.

Arbitrary or unreasonable tests, standard or practice with respect to literacy shall mean any requirement designed to determine——

I omit the literacy——

to determine comprehension, intelligence, or understanding in the case of any citizen who has not been adjudged an incompetent, who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia.

Now, if you had an old dean who had lost his faculties, but who had completed a sixth grade course in school before he lost them, he would be entitled to vote on this, notwithstanding that the State law might say that persons in that mental state are not allowed to vote?

Dean GRISWOLD. You are suggesting, Senator, that it would be shocking if I were allowed to vote?

Senator ERVIN. No, sir; I expressly said that you are not an old dean. You may have lost some of your teaching faculty but not your own personal faculties.

But would not that bill say that the State could not deny an insane person who had, in times past, completed the sixth grade education?

Dean GRISWOLD. Yes; I think that as I understand it, as now written, it would have that consequence and therefore may need some amendment which is the sort of thing, as I understand it, that congressional and senatorial committees are constantly doing in perfecting bills which are presented to them. I would like to see such amendments very carefully considered so we do not let in the back door what we are trying to keep out the front door.

Senator ERVIN. Would you look for a moment at S. 2750? That is the Mansfield bill. This is an operating statute that is included in section 2?

Dean GRISWOLD. Yes; the operative part is in section 2, although the findings which precede it are an important part of the basis for section 2.

Senator ERVIN. Is there any reference whatever in section 2 to the denial or abridgment of rights on the basis of race, color, creed, or previous condition of servitude?

Dean GRISWOLD. No; but there is in the findings preceding it. The findings preceding it say that literacy tests are used for the purpose of discrimination on the ground of race and then section 2 eliminates literacy tests in the case of a person who has a sixth grade education.

Senator ERVIN. And regardless of whether there has been any denial or abridgment of his right to vote on the basis of race, color, creed, or previous condition of servitude?

Dean GRISWOLD. Yes.

Senator ERVIN. Do you not agree with the decisions which say that Congress has no power to legislate in any way in connection with State qualifications in respect to State and municipal elections, except under the 14th amendment?

Dean GRISWOLD. Well, we have been through that, Senator. I still claim a little bit from article I, section 2, and the 13th amendment. But essentially it is the 14th and 15th amendments.

Senator ERVIN. Well, you do know that the courts have held that a number of times?

Dean GRISWOLD. No: I am afraid I do not—no, I don't know that they have held that Congress has the power under the 14th amendment.

They have held State actions invalid under the 14th and 15th

amendments. Congress very rarely has exercised its power under the 13th, 14th, and 15th amendments. As I said in my opening statement, I think that is unfortunate, and Congress has the responsibility and should exercise the powers.

Senator ERVIN. Of course, I was taught at Harvard Law School not to put too much credence in text statements of law as contrary to statements of decisions themselves, but for the sake of shortness of time, 18 American Jurisprudence, page 183, on the subject of elections, says that the power of Congress to legislate at all upon the subject of voting in State elections, unless it may be with respect to election of Senators or Representatives, rests upon the 15th amendment.

Dean GRISWOLD. I think it also rests on the 14th amendment and possibly under article I, section 4, certainly to a considerable extent on article I, section 4. I would say that the editors of "American Jurisprudence" would get about a "C minus" on that statement.

Senator ERVIN. Yes. Well, now, what would you give the sixth circuit for saying this in *Karem v. United States*:

But the power of Congress to legislate at all on the subject of voting in purely State elections is entirely based upon the 15th amendment.

Dean GRISWOLD. I would say it is too sweeping a statement and not wholly accurate. You do not recall which judge it was who wrote that, do you?

Senator ERVIN. Judge Lurton. He was circuit judge in the sixth circuit.

Dean GRISWOLD. Oh, yes; he is one who later went to the Supreme Court.

Senator ERVIN. Yes; a very distinguished lawyer.

Dean GRISWOLD. A very eminent gentleman. But I think he spoke too sweepingly at that time.

Senator ERVIN. Now, the 14th amendment is a prohibition upon State action is it not? The first section of it?

Dean GRISWOLD. Yes.

Senator ERVIN. Do you contend there is anything in any of the other sections on the power of Congress to legislate with reference to voting than the 14th amendment?

Dean GRISWOLD. No; the first section does.

Senator ERVIN. And the first section prohibits the States from denying to any citizen of the United States the privileges and immunities of citizens and—

Dean GRISWOLD. And due process of law and equal protection of the law.

Senator ERVIN. Yes. Now, if a constitutional provision and a statute such as those involved in the *Lassiter* case establish a literacy test which applies alike to all persons in like circumstances, it does not violate the first section of the 14th amendment, does it?

Dean GRISWOLD. If there is no proof in the case, as there was none in the *Lassiter* case, that the test is applied in a discriminatory manner, that is true, if Congress has not passed legislation to modify or qualify the power of States to pass literacy tests.

If this bill were passed, then to the extent that the bill goes, and let us take the basic recommendation of the Commission which is the sixth grade education, the States would not have power thereafter

to say that a person who had a sixth grade education was disqualified from voting on the ground of illiteracy. They could say he had been convicted of a crime or some other ground, but they could not say he was disqualified on the ground of being illiterate or he could not explain or understand any part of the Constitution.

Senator ERVIN. The bill would say that that is true, even though the registrar who passed on his qualifications was not motivated in any way by reason of the man's color or race or previous condition of servitude?

Dean GRISWOLD. Yes; yes; no question about that. Just as if a young man comes into my office, I am a notary public and he has an absentee voter's ballot and he wants to vote and I say "How old are you," and he says "I am 22," I can not say "Well, I will not do it, even though you are 22; I do not think you are qualified and you cannot do it."

If he is 21, he can vote, period.

Senator ERVIN. In other words, under section 2 of this bill, it is wholly immaterial whether the man who denied him the right to vote refused on the grounds of race, color, creed, or previous condition of servitude at all? It covers everybody, does it not?

Dean GRISWOLD. Yes.

Senator ERVIN. Is there anything in the 15th amendment that allows Congress to pass general legislation covering everybody?

Dean GRISWOLD. Yes; there is power granted to Congress in the 15th amendment to pass legislation eliminating discrimination on the ground of race with respect to voting and there is a provision in the 14th amendment eliminating discrimination on any unreasonable ground.

Senator ERVIN. Let us go back to the 15th amendment. Dean, do you not know that this 15th amendment has been uniformly interpreted to apply only one restriction on the States insofar as prescribing of qualifications under section 2 of article I. Namely, it deprives the State of the power to enact as a qualification, race, or color, or previous condition of servitude?

Dean GRISWOLD. By either simple or sophisticated means, to use a phrase that the Supreme Court has used. The literacy test has become a sophisticated means of providing discrimination on the ground of race, as mountains of evidence show.

Senator ERVIN. I think we have agreed on three propositions with reference to these amendments: That any effort to predicate these bills, or predicate the power of Congress to enact these bills, on the basis of the 13th amendment would be a rather thin foundation.

Dean GRISWOLD. Yes; but helpful, a nice background for the 14th and 15th amendments.

Senator ERVIN. But by itself, if a man were standing on that ice, it would break through?

Dean GRISWOLD. Well, Senator, I might break through, but I do think you might just stand up.

Senator ERVIN. I would never undertake to stand on that position because I think there is no relation between slavery and involuntary servitude and qualifications for voting.

But insofar as legislation itself as distinguished from the application of legislation, we agree that a statute prescribing qualifications for voting, which applies alike to all people, all races, does not violate the 14th amendment, do we not?

Dean GRISWOLD. On its face, it may not violate the 14th amendment, but in actual operation by State officers acting under color of the statute, it might.

Senator ERVIN. In other words, there are two ways you can violate the 14th amendment. A legislature of a State can violate it by mere enactment of a statute which discriminates between any person and then, of course, it can be violated by those who are engaged in carrying out the statute, invalid on its face by improper practices.

Now, do we not agree that the only thing that the 14th amendment does with reference to the power of the State in any election, so far as the 15th amendment is concerned, is that it merely prohibits the State from discriminating against a man insofar as his voting rights are concerned on account of his race, color, or previous condition of servitude?

Dean GRISWOLD. Insofar as the 15th amendment is concerned; yes, sir.

Senator ERVIN. Now, Dean, you compared the interstate commerce laws to the provisions of the Constitution relating to voting.

I will ask you if there is not a very wide gulf between the power of Congress under section 2 of article I and the interstate commerce clause, in that Congress has no power whatever to legislate under section 2, article I, in the absence of some discrimination; whereas Congress has the complete power to legislate with respect to interstate commerce.

Dean GRISWOLD. But with respect to discrimination, which is the only area we are talking about, Congress has complete power to legislate.

Senator ERVIN. Well, I think you and I would disagree on that, and I think maybe the Supreme Court thus far has been on my side.

Dean GRISWOLD. I am eagerly awaiting the word from the Supreme Court.

Senator ERVIN. I am going to say this:

Section 8 of article I says, and I will admit it does not deal with the question:

The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Now, that gives Congress the whole power, does it not?

Dean GRISWOLD. No; no; the States have power to regulate commerce with the several States and with foreign nations and with the Indian tribes, as the Supreme Court has repeatedly held, to a very considerable extent, as long as Congress does not act. If Congress acts, then the Federal legislation supersedes, takes over, and I suggest that that is a very close analogy to the situation under the power-granting clauses of the 13th, 14th, and 15th amendments.

Senator ERVIN. Well, I would hate to get into an argument with a dean about that, but frankly, I think the distinction between the power of Congress under the Interstate Commerce Act and its power under the 14th and 15th amendments is just about as wide as the

gulf which yawns between Lazarus and Abraham's bosom and Dives in Hell.

Now, here is the difference—there is a good deal of difference about this. Now, here is a provision, of course, in this same article I, which deals with the power over interstate commerce. Congress has the—

Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Now, I say what I said a while ago, because the power of Congress to legislate with reference to interstate commerce is absolutely unlimited. The power of Congress to legislate with reference to the 13th amendment is as follows:

Congress shall have power to enforce this amendment by appropriate legislation

and by the 14th amendment, section 5:

Congress shall have the power to enforce by appropriate legislation the provisions of this article

and the 15th amendment says in section 2, that

the Congress shall have the power to enforce this article by appropriate legislation.

In other words, the legislation which Congress has the power under these amendments to adopt is not the power to legislate generally and fully with respect to the subject, but the power to adopt legislation which is appropriate to enforce a prohibition on State action.

Dean GRISWOLD. Just as the power of Congress to regulate commerce is the power to adopt legislation which is appropriate to the regulation of interstate and foreign commerce, in the sphere to which the power relates, the power of Congress is equally unlimited under both interstate commerce and the amendments.

Senator ERVIN. Well, Dean, does not Congress have the power to regulate everything in connection with interstate commerce?

Dean GRISWOLD. No. No, the States still have power to enforce inspection laws and pilotage and some things of that kind, even on its interstate and foreign commerce.

Senator ERVIN. Well, Congress could supersede that, could it not?

Dean GRISWOLD. As I recall it, there is a provision in the Constitution which grants that power to the States.

Senator ERVIN. Well, that would be one specific exception to the rule. The general rule is a doctrine laid down by Congress and by the Supreme Court a number of times. I read from the *Civil Rights* case of 1883, which deals with the 14th amendment. After saying that it gives Congress the power to enforce these provisions of the 14th amendment by appropriate legislation, the decision says:

To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them ineffectually, null, void and innocuous. This is the legislative power conferred upon Congress and this is the whole of it. It does not vest Congress with the power to legislate upon subjects which are within the domain of the State legislation, but to provide relief of State legislation or such action of the kind referred to. It does not authorize Congress to create a code of municipal law * * * but to provide modes of redress against the operation of State laws and the action of State officers, executive or judicial, when these are subversive

of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the 14th amendment, but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges and by power given by the Congress * * * and such legislation must necessarily be predicated upon such supposed State laws or State proceedings and be directed to the correction of their operation and effect.

Then it says:

An apt illustration of this distinction may be found in some of the provisions of the original constitution.

The constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected; and this power was exercised.

Then it goes ahead and speaks, makes a contrast between the power of Congress to enact legislation to enforce a prohibition and power of Congress in interstate commerce. I read from page 18:

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject * * * as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war—

et cetera.

In these cases, Congress has power to pass laws for regulating the subjects specified in every detail and the conduct and transactions of individuals with respect thereof.

In other words, it says that the power of Congress to enforce a prohibition under the 14th amendment does not invest Congress with the power to invade the domain of State legislation. Certainly the power to prescribe qualifications of voters is a power which, under the Constitution, is in the domain of State legislation.

Dean GRISWOLD. Subject to the 14th and 15th amendments and the valid statutes enacted by Congress pursuant to them.

I would like to bring the Supreme Court to my defense, because I rather like the Supreme Court, too. *Ex parte Virginia* was a jury trial case decided in 1879. The Supreme Court said:

Whatever legislation is appropriate that is adopted to carry out the objective the amendments have in view

and that is the 13th, 14th, and 15th amendments:

Whatever tends to enforce submission to the prohibitions they contain and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion if not prohibited is brought within the domain of congressional power.

That is in substance all I am contending for.

Senator ERVIN. That was a jury case?

Dean GRISWOLD. That is a jury case.

Senator ERVIN. Excluding a man from a jury on account of his race.

Dean GRISWOLD. That is right. It is just as bad to me to deny a man a right to vote because of his race.

Senator ERVIN. I am glad you get consolation out of the *Virginia* case. Here is an equal protection of the laws case of the 14th amendment prohibiting this discrimination, an exclusion of a man from a

jury on account of his race. So what did Congress do? It adopted a law that was appropriate to enforce legislation. It made a man indictable, an official indictable who excluded a man from a jury on account of his race. Therefore, it was a proper enforcement of the prohibition of the amendment, whereas these bills, instead of doing that, instead of providing any remedy against State action, just let the Federal Government enter into the field of State legislation and prescribe a qualification. So the *Virginia* case supports my case, I contend.

Dean GRISWOLD. No; I would not agree. I do not think you seriously contend, Senator, that in any appreciable number of cases, a registrar of voters could properly decide that a person who had a sixth grade education was illiterate.

Senator ERVIN. But it is conceivable that there are cases, is it not?

Dean GRISWOLD. It is conceivable that there are cases.

Senator ERVIN. In other words, that is a question of fact, is it not?

Dean GRISWOLD. It may be in a particular case.

The fact is, as is widely known, literacy tests are used in many States for the purpose of racial discrimination. Congress has power to eliminate that racial discrimination and I would go so far as to say that Congress has the duty to do it. We are only talking about State action. We are not talking about private action, so the *Civil Rights* cases of 1884 are not relevant. These bills are an effort to carry out the power and duty given to Congress in the 14th and 15th amendments to eliminate discrimination in voting.

Senator ERVIN. Sir, I would say these decisions did not have anything to do with individual action. Some of them had to do with State action.

Dean GRISWOLD. No; the *Civil Rights* cases, as I recall it, were individual.

Senator ERVIN. That is true in the *Civil Rights* cases, but these other cases are cases that dealt with State action.

Dean GRISWOLD. They did not deal with the power of Congress to legislate in the area.

Senator ERVIN. Yes, sir; now, among other cases, here is a case, *James* against *Bowman*—that did deal with individual acts. I beg your pardon on that.

For example, here is a case, 92 U.S. 214. In this case, the court had under its consideration the constitutionality of sections 3 and 4 of the act of May 31, 1870. The indictment charged that two inspectors of municipal election in the State of Kentucky with refusing to serve the votes of certain colored voters in contravention of the third section of the act. The section in question was directed to the conduct of election judges and inspectors, but did not limit the operation of the act to exclusions from suffrage on account of race, color, or previous condition of servitude.

The Supreme Court held in that case that Congress had no power to enact that law, that it was not appropriate to enforce the 15th amendment because it was not restricted in its application to the race, color, or previous condition of servitude.

You will find a number of cases on that.

Dean GRISWOLD. That is certainly true of the 15th amendment, Senator, but there also remains the 14th. The case seems to me to

be quite irrelevant, because these bills quite plainly are designed to deal with discrimination on the ground of race, color and previous condition of servitude.

Senator ERVIN. But they are designed to remedy the situation by having the Federal Government enter the field and adopt affirmative legislation in the area in which the States have the power to legislate.

Dean GRISWOLD. Subject to the power of Congress to pass legislation under the appropriate sections of the 13th, 14th, and 15th amendments.

Senator ERVIN. Well, Dean, under your theory, the Congress could make some preambles and some recitations in any act, and could rob the States of power to function, could they not?

Dean GRISWOLD. No; plainly not.

Senator ERVIN. They could rob the States of the power to prescribe the age, qualifications, and so on, for voters could they not?

Dean GRISWOLD. No; I do not think so. Certainly on age. If a State adopted an age qualification that nobody under 65 or over 70 could vote, I would guess that Congress could pass a statute if it needed to or that a court would hold that it was invalid.

Senator ERVIN. Well, Dean, a State could certainly pass a statute to disqualify a voter on the ground of a felony, could it not?

Dean GRISWOLD. Yes; at least in the absence of a valid statute by Congress that they could not. At the moment, I can not conceive any basis on which such a statute by Congress would be valid.

Senator ERVIN. I want to read just a little bit from this *Karem* case, written by Judge Lurton, Circuit Court of Appeals, Sixth Circuit, reported in the 101 Federal Reporter:

The 15th amendment is therefore a limitation upon the powers of the States in the exercise of their otherwise unlimited right to prescribe the qualifications of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color or previous condition of servitude. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the State, the power of the State to prescribe qualifications being limited in only one particular. The right of the voter not to be discriminated against in such elections on account of race or color is the only right protected by this amendment and that right is a very different right from the affirmative right to vote. There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article. First, legislation authorized by the amendment must be addressed to State action in some form or through some agency; second, it must be dealing with limiting a voter on account of race, color, or previous condition of servitude.

I respectfully submit that since it applies to all persons, a literacy standard, irrespective of whether it is denial by race, does not exist.

Dean GRISWOLD. You, I take it, Senator, would vote against the findings of fact in the first section of the bill. If those findings of fact are not sound, then it seems to me your constitutional position is sound, and Congress would not have the power to pass it.

If these statements of fact are sound, and my own view is that overwhelmingly they are sound, then my position is that Congress would have the power, even in the face of Judge Lurton's opinion which you read.

Senator ERVIN. *James v. Bowman* is an interesting case on this point of appropriate legislation. There, some men were indicted for violation of a statute. This case is reported in 190 U.S. 127.

Dean GRISWOLD. 190, or 109?

Senator ERVIN. 190.

Dean GRISWOLD. Thank you.

Senator ERVIN. It says this:

Every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage to whom that right is guaranteed by the 15th amendment to the Constitution of the United States by means of bribery or threats or depriving such person of employment or occupation or subjecting such person to loss of house, lands or other property, or by threats or refusing to renew leases or contracts for labor or by threats of violence to self and family, shall be punished by means provided in the preceding section.

These persons were indicted for bribery and it was held—of course, there was no State action. But it was also held that the statute was not within the power of Congress as appropriate legislation under the 15th amendment because it was not restricted, because it dealt with bribery but did not allege that the bribery was because of race, color, or previous condition of servitude. That is, in my mind, an adjudication to the effect that Congress has no right to pass any law on this subject under the 15th amendment: except a law to prohibit discrimination on the ground of race, color, or previous condition of servitude. This is an interesting case.

Dean GRISWOLD. And by State action, both of which are present in these bills.

Senator ERVIN. I agree with the statement of State action but the Court did not stop with bribery. It said it had no right under the 15th amendment to do anything of any nature except to prevent the State from discriminating against a man because of his race and color and previous condition of servitude.

Dean GRISWOLD. That is a very interesting case, but it does not bear on the problem with which we are concerned today.

Senator ERVIN. I think it does. If you cannot deal with bribery under the 15th amendment, how are you going to deal with literacy tests?

Dean GRISWOLD. Because bribery is a private action and literacy tests are State action. It is a very clear distinction.

Senator ERVIN. But the Court put the case on both these grounds, that it was not appropriate legislation because it was not restricted.

Dean GRISWOLD. Well, I take the view that the qualification of literacy tests is directly applicable to the elimination of discrimination on the ground of race and color.

Senator ERVIN. Dean, I have some more questions. Would you rather go on or would you rather catch your plane?

Dean GRISWOLD. No; it is a long time, and there is another one later.

Senator ERVIN. I wonder if you would rather finish before we recess for lunch.

Dean GRISWOLD. You do whatever is convenient for you, Senator.

Senator ERVIN. There is a discrepancy as to how many States have literacy tests. I have here 19, some say 20, some say 21. My own opinion is that there are 21. Virginia does not specifically say it has a literacy test, but it does require a man to make an application in his own handwriting. There is some doubt as to whether Oklahoma has

ever reenacted its literacy test after the *Guinn* case. However, I feel that this many States have literacy tests.

I think it is based largely on a study made by the Library of Congress.

Dean GRISWOLD. That is my understanding. The information that I have is that there are 20, including Virginia. It obviously becomes a question of interpretation whether a particular test is a literacy test or not.

Senator ERVIN. In other words, the way I figure it from this study, you have 14 States outside the Southern States. These are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New York, Oklahoma, Oregon, Washington, and Wyoming.

Does the Civil Rights Commission have any evidence indicating that literacy tests have been used in any 1 of these 14 States to deprive any man of the right to vote on account of race?

Dean GRISWOLD. No; and it has no evidence that indicates that any person who has a sixth grade education was ever excluded from the right to vote.

Incidentally, I gather that Oklahoma is the State that you have that is not on my list. I am not familiar with what the provision is in Oklahoma now.

Senator ERVIN. That is the one I made somewhat of a reservation about, Oklahoma. Of course, in the *Guinn* case, the literacy test of Oklahoma which the Court declared by itself would have been valid, was tied by one regulation to the "grandfather" test and, of course, the Court struck them both down because of the tie-in, although it stated the literacy test by itself would have been constitutional.

The study by the Library of Congress indicates that this section is still on the books of Oklahoma. Whether it has been reenacted as a separate bill I do not know.

Now, my analysis shows that there are only seven Southern States which have a literacy test. They are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, taking the Virginia application to be a literacy test.

Now, does the Civil Rights Commission have any evidence to indicate that all of these seven Southern States are guilty of widespread denial of the right of people to vote on account of their race and color under the pretext of the literacy test?

Dean GRISWOLD. I am not sure that I can say in all of them, and I hate to say that the States do. I think there is evidence that in many of those seven Southern States, State officials do use literacy tests as a means of discrimination on grounds of race and color.

Senator ERVIN. Now, in my State, the NAACP has been very active in trying to get complaints. They have a field agency which works for them. We also have a very active State advisory committee which has given great publicity to its functions.

Despite this fact, the report of the Civil Rights Commission on voting shows there have been only 39 complaints of denial of the rights of voting by the colored race in North Carolina, notwithstanding the fact that the Negro population of North Carolina is 1,116,000.

Now, I do not know whether the complaints are on the basis of the literacy test, because the report does not state, but the complaints only originated in some 7 or 8 precincts out of a total of about 2,200

precincts in North Carolina. Do you think that that kind of action on the part of North Carolina, the fact that they have had only 39 complaints, some of these 39 complaints may have been without foundation; I do not know that they were or were not. But assume that they were all valid and involved the literacy test. Do you think that that fact would justify Congress in saying that the North Carolina literacy test, which has been upheld as a valid test by the Supreme Court, should be outlawed?

Dean GRISWOLD. Senator, I do not think that that statute if passed by Congress would impair North Carolina to any appreciable extent. Incidentally, any State which does a good job in nondiscrimination is certainly entitled to every commendation it can get. The enactment of this statute would not impair or hamper North Carolina in the exercise of its powers.

It would help to eliminate serious discrimination which is plainly occurring in other States.

Senator ERVIN. Would not this statute, if it were passed, say that no registrar in North Carolina could make an inquiry with a view to determining a man's qualifications in this field, beyond that of having passed the sixth grade?

Dean GRISWOLD. Yes; and it seems to me that would be appropriate.

Senator ERVIN. He would be prohibited from ascertaining whether a man can read or write provisions of the North Carolina constitution?

Dean GRISWOLD. If he has completed the sixth grade education; right.

Senator ERVIN. You gave 100 counties as being counties with a situation in which there was an abuse of literacy tests by Southern States using them as a device to prevent a man from registering to vote on account of race, color, and previous conditions of servitude; did you not?

Dean GRISWOLD. I referred, I believe, to 129 counties.

Senator ERVIN. Now, the Library of Congress informs me that there are 3,071 counties in the United States. The Civil Rights Commission is urging that all of the 50 States be deprived of their right, which I say is a constitutional right, to enact legislation setting up their own literacy test, because of the misconduct of 129 counties out of 3,071. Is that not sort of visiting the sins of the guilty upon the innocent with a vengeance?

Dean GRISWOLD. Senator, I did not say these were the only counties that do bad things. I just said these were the worst.

These 129 are so bad that nothing can be said for them as far as I can see. The problem extends through a great many other counties in a substantial number of States.

Senator ERVIN. Well, we have in North Carolina, 100 counties, and on the basis of the Civil Rights' own statement, I would say there have not been any offenses reported to them except in 5 of the 100 counties. Then you have, according to my interpretation of the report of the Library of Congress, you have 14 States in which there is no abuse of this; that you have no evidence of any abuse.

Dean GRISWOLD. Of the literacy requirement?

Senator ERVIN. Yes.

Dean GRISWOLD. That is correct.

Senator ERVIN. So whether this is 129 counties or more, you are depriving 95 North Carolina counties and 14 other States of the right to prescribe literacy tests of their own because of the sins of somebody else.

Dean GRISWOLD. No; not really. North Carolina and Massachusetts can still prescribe literacy tests for people who do not have a sixth grade education, and there are in North Carolina a very large number of persons, Senator, who do not have a sixth grade education. There are some, I regret to say, in my State and all States. And incidentally, is it not fair to say that that is the group, those who do not have a sixth grade education, where it is really fair to inquire whether they are literate or not? That is all this statute does.

This is the case I would disagree with what Senator Sparkman was saying, Senator, this morning. This legislation does not provide that no one can vote unless he has a sixth grade education. This simply says that if he has a sixth grade education he cannot be denied the right to vote on ground of illiteracy.

Senator ERVIN. Do you agree with me he cannot be denied the right to vote even if he cannot read or write?

Dean GRISWOLD. Not on the ground of illiteracy.

Senator ERVIN. And even if he were totally insane?

Dean GRISWOLD. No; I think under this statute a State could deny a man a right to vote if he were "insane" under a reasonable definition of "insane." They could not deny it on the ground that he was illiterate, but that he was mentally incompetent.

Senator ERVIN. Dean, does not this statute say that the only test you put to him, whether he is insane or not, is whether he has a sixth grade education?

Dean GRISWOLD. It may be that this statute says that. It may well be that the proper protection of the States in such cases is to provide for an adjudication of insanity for those persons who should not vote because of having lost their mental competency which they once had.

Actually, I do not expect this is a very serious matter, because most mentally incompetent people do not know that there are elections and do not try to vote.

Senator ERVIN. Dean, have you studied the literacy tests of the 21 States I have named?

Dean GRISWOLD. Not with great thoroughness. I am familiar in a general way with some of them, yes. I have not made a scholarly survey, State by State, of the exact statutory provisions and their interpretation and administration.

Senator ERVIN. Now, I would say that, in my opinion, of the 21 States that have literacy tests, there is only 1 that now has any clause which, in my judgment, could possibly be held unconstitutional under the decision of the Supreme Court in the *Williams* case, the statement in the *Guinn* case, the statement in the *Lassiter* case, and the decision in the circuit court of appeals in the *Trudeau* case. There is the exception, perhaps, of the amendment made by Mississippi in 1954 or 1955, with reference to a man's making a reasonable explanation about the obligations and duties of citizenship. Every one of the others that I have been able to study merely has a qualification based upon the ability to read or write or speak the English language, or a combination of those capabilities, and accept his ability to read, write, or speak

English. Some of these States do not specifically say "English." In North Carolina they must be able to read and write a certain portion of the Constitution of the State, or the Federal Government, or both, in a few instances. It has been held in the courts that whenever the Constitution is written in English and the requirement of reading or writing a portion of the Constitution constitutes a literacy test, that has to be in English.

Now, the Mansfield-Dirksen bill, if it were enacted into law, would change the literacy tests of all of these States insofar as it was to be conducted solely in English, and add another one, that if a man had completed the sixth grade in Puerto Rico, he could come and register, so far as the literacy test is concerned, in any State, even though he could not read or write or speak English. Is that not true?

Dean GRISWOLD. Yes; and I might point out, this is not part of the recommendation of the Civil Rights Commission. It is in the bill, but it goes beyond the recommendation of the Civil Rights Commission.

Senator ERVIN. It seems to me this would be a drastic operation on the part of Congress.

Dean GRISWOLD. I have some understanding and some sympathy with it. I think it is an aspect of the problem. I would be glad to see it included in the bill, but I would rather have the bill without it than not have the bill at all.

Senator ERVIN. Dean, when all is said, do not these bills undertake to deprive the 50 States of their power under section 2 of article I and the 17th amendment to prescribe qualifications in the nature of literacy tests merely because 7 of these States, to some degree, great or small, and I maintain in the case of North Carolina exceedingly small, have violated the 14th amendment?

Dean GRISWOLD. No; it does not deprive any of these States of the right to have a literacy test, but only of the power to say that a person who has a sixth grade education is not literate. You have a wide range, covering 21 percent of the Negro voters in one State, where the State could still carry out its literacy test.

Senator ERVIN. It could not exact any kind of a literacy test of any person who has had a sixth grade education, even though he might not be literate?

Dean GRISWOLD. That is correct.

Senator ERVIN. I want to read you some statement from United States against Harris, quoted in 106 U.S., page 630:

The language of the amendment—

that is, the 14th amendment, and the same thing would apply to the 15th—

The language of the amendment does not leave this subject in doubt. When a State has been guilty of no violation of its provisions, when it has not made or enforced any law abridging the privileges or immunities of citizenship of the United States, when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied any person within its jurisdiction of the equal protection of the laws, when on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

Now, in the face of that statement, these bills do undertake to deprive 43 States which, so far as the Civil Rights Commission knows, have denied nobody any right under these constitutional provisions, of their right upheld by the Supreme Court in the *Lassiter* case, in the *Williams* case, in the *Trudeau* case, and inferentially, in the *Guinn* case, to prescribe a literacy test inconsistent with that Federal test which is set up in this act?

Dean GRISWOLD. As applied to people who have a sixth grade education, yes.

Senator ERVIN. Then if Congress can take over the whole field without anything more than—

Dean GRISWOLD. Oh, plainly not; plainly not, Senator. Congress can act in situations where its action is reasonably calculated to achieve an end which is within the clear constitutional power of Congress.

If Congress seeks to go beyond that, its legislation would be invalid. Congress has power by legislation to enforce the 14th and 15th amendments.

Senator ERVIN. But if Alabama violates the 14th or 15th amendment and 6 other States and the other 43 do not, that gives the Congress the right, you say, to go in and enforce the prohibition in those States which have not violated the amendment?

Dean GRISWOLD. Congress frequently passes statutes which are effective in areas where the State—

Senator ERVIN. But Congress has no power whatever in this field unless there is discrimination?

Dean GRISWOLD. Congress has power to eliminate discrimination, both generally under the 14th amendment and with respect to race and color under the 15th amendment. It has not only the power, but I really believe the responsibility, the duty.

Senator ERVIN. In other words, if one State in the Union or one county in one State should use any of its qualifications for voters to deprive any person of the right to vote on the ground of race, color, or previous condition of servitude, Congress can adopt a law applicable to all of the other States and denying any of these other States any right to adopt a qualification inconsistent with Federal statute?

Dean GRISWOLD. Yes, Senator.

The Fair Labor Standards Act, I understand, is in force in North Carolina. It may have been in force in North Carolina without any evidence that employers in North Carolina were not complying with fair labor standards. Congress found that as a matter of the regulation of interstate commerce throughout the country it was desirable to specify certain fair labor standards. It enacted them without regard to what the laws in the several States were. And this was a clearly valid, so held by the Supreme Court, exercise of the power of Congress to regulate commerce.

Senator ERVIN. That was because under the Constitution of the United States Congress had the affirmative power to regulate interstate commerce, and not simply the power to enforce a prohibition against State action.

Dean GRISWOLD. Congress has the affirmative power to pass legislation to enforce the provisions of the Constitution prohibiting dis-

crimination on the grounds of race and color, in article XV, and discrimination generally in the 14th amendment, and under the findings which are made in the first section of this bill, and amply supported by evidence before Congress, those provisions are reasonably calculated to carry out the power granted to Congress.

Senator ERVIN. Let me ask you a question. Would this bill be valid without the preambles and whereases, either one of them?

Dean GRISWOLD. I think so, Senator. The whereases and the findings simply help. But there are many cases—the so-called Brandeis brief is an instance where the economic and social data upon which the validity of the legislation stands are brought before the Court, which decides it, in some other way. I don't think that the finding of Congress necessarily is conclusive. But after all, Congress is a very responsible body, and if it does find facts which support its action, that is surely very helpful as an explanation of the factual background upon which the action of Congress rests.

Senator ERVIN. Dean, can you specify any one of the literacy tests of any of the 21 States that have a literacy test, which would not be held constitutional as far as its phraseology is concerned under the decision of the Court in the *Lassiter* case?

Dean GRISWOLD. I think that the Mississippi one about duties and obligations of citizenship would be plainly bad. And then, of course, we are concerned not merely with the way it is written, but the way it is administered. And on that I would like to ask you a question, Senator. Have you read the hearings before the Civil Rights Commission in Louisiana?

Senator ERVIN. I have read some of them.

Dean GRISWOLD. I don't think you have much doubt then that the literacy test is administered in Louisiana as a means of racial discrimination.

Senator ERVIN. I think there has been some evidence of that. But I don't think there have been any wrongs done that a few old-fashioned criminal prosecutions under the statute wouldn't cure.

As a matter of fact, I inquired of the Department of Justice a couple of years ago as to how many criminal prosecutions they have had in cases where a State official was alleged to have wrongfully denied a man the vote in a racial case, and they gave some insignificant number, I have forgotten the exact number. It seems to me it was only about 5. And, in two of the cases, if I recall correctly, they didn't even draw an indictment, but just asked the grand jury to investigate the matter without an indictment.

Dean GRISWOLD. I understand in the last 15 months, Senator, there has been a great increase in the number of cases brought.

Senator ERVIN. Under the Civil Rights Act of 1957.

Dean GRISWOLD. No. Well, I guess, yes, under the Civil Rights Act of 1960, and under other legislation generally.

Senator ERVIN. Now, you take the position that, under this bill, a State would have absolutely no right to show that a person who a sixth grade education was not literate.

Dean GRISWOLD. If Congress passes this statute, that would be right.

Senator ERVIN. And that is not simply a question of evidence; that is a matter of substantive law, isn't it?

Dean GRISWOLD. That is a matter of law. Congress has made that judgment as an exercise of its power to enforce the 14th and 15th amendments.

Senator ERVIN. And Congress could take any other grade, first grade, second grade, third—just anything.

Dean GRISWOLD. I don't know how far it could go, Senator. It is like being 21. Where did 21 come from? It might just as well be 20, or it might just as well be 22. But maybe 14—that is another matter. And if this bill called for first grade, I would be on that thin ice we were talking about a while ago. I am not sure that third grade wouldn't be ground on which I would be willing to stand. But the Commission was trying, in its recommendation and the proposers of these bills adopted the same view—to take a position which was clearly sound. A sixth grade education, which is not just something that we dreamed up but something which the Census Bureau has independently used as the line for determining literacy, should be the standard which the States can't contravene in applying their own literacy tests.

Senator ERVIN. Do you know of any principle that would put any limitation on the power of Congress—

Dean GRISWOLD. Oh, yes, Congress must exercise its powers reasonably, and within constitutional provisions. They must be calculated in this particular case to help to enforce the 14th and 15th amendments. I am not sure that first grade or kindergarten or nursery school could be shown to do that.

On the other hand, if you would accept that having a Ph. D. would be sufficient to establish literacy, then we could discuss where between nursery school and Ph. D. the line might be drawn, and my guess is that sixth grade is very likely where we would turn up.

Senator ERVIN. Well, Dean, I don't know whether I would accept intelligence, because I have heard of a man that has been educated way past his intelligence. And I have seen some Ph. D.'s that I thought fall in that classification.

Dean GRISWOLD. I agree with that thoroughly. We are not talking about intelligence. We are talking about literacy.

Senator ERVIN. In this *Baker* case, from Tennessee, which was handed down the day before yesterday, Mr. Justice Douglas, in his concurring opinion said this:

That the States may specify the qualifications for voters is implicit in article I, section 2, clause 1, which provides that the House of Representatives shall be chosen by the people, and that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The same provision contained in the 17th amendment governs the election of Senators. Within limits those qualifications may be fixed by State law. Yet as stated in *Ex Parte Yarbrough*, those who vote for Members of Congress "do not owe their right to vote to the State law in any sense, which makes the exercise of the right to depend exclusively on the law of the State." The power of Congress to prescribe the qualifications for voters and thus override State law is not in issue here. It is, however, clear, that by reason of the commands of the Constitution there are several qualifications that a State may not require. Race, color, or previous condition of servitude, are impermissible standards, by reason of the 15th amendment, and that alone is sufficient to explain *Gomillion v. Lightfoot*. Section 2 is another impermissible standard by reason of the 19th amendment. There is a third barrier to a State's freedom in prescribing qualifications of voters, and that is the equal protection clause of the 14th amendment, the provision marked here.

I take the position that under the Constitution and under the interpretation that that sets out, this is the correct rule which governs in this case. I take the position that this is not appropriate legislation, as I have explained, in that it is an effort to have the Congress legislate affirmatively in that field where it has no affirmative power, but merely the power to prevent a prohibition on the part of the State.

Dean GRISWOLD. I didn't hear anything in that passage you read, Senator, with which I would disagree.

Senator ERVIN. I don't see, Dean, as far as what the Constitution says, that you and I are too much at difference. I disagree with you that this is not appropriate legislation. I don't think the Federal Government under any circumstances can prescribe the qualifications for voters. It can merely prohibit the discrimination against a person under the 14th, 15th, and the 19th amendments. But I don't think that the Federal Government can come in and legislate, within the domain of State legislation, to enforce a prohibition. When it undertakes to do so, it transgresses its power to enforce the amendments by appropriate legislation. This bill undertakes to set up a Federal standard in lieu of State standards, and therefore is unconstitutional.

Dean GRISWOLD. Well, Senator, suppose a State passed a statute, in its wisdom, saying that only native-born citizens of the United States can vote in this State—no naturalized citizen, no matter how long he has been a resident can vote in this State. I have no doubt that Congress could pass a statute under the 14th amendment saying that that limitation was invalid.

Senator ERVIN. I have no doubt of that either, because the 14th amendment defines "citizenship."

Dean GRISWOLD. And also provides for equal protection, and for protecting the privileges and immunities of citizens of the United States.

My view is that these statutes before the committee rest on exactly the same ground.

Senator ERVIN. Well, the difference is a negative and an affirmative. In other words, the difference as I see it is that the legislative power of Congress under these amendments is restricted to legislation to enforce a prohibition on State action, and the Congress is not justified in taking upon itself the power to do what the State has power to do.

Dean GRISWOLD. I know of no foundation in any court decision, Senator, which says that the powers expressly granted to Congress, in the appropriate sections of the 13th, 14th, and 15th amendments are limited to saying that what a State does is invalid. Those clauses, by their express terms, give Congress power to enforce these provisions. And I know of no reason why that does not authorize Congress to take affirmative action to enforce them. And I know of no decision which says that Congress cannot take affirmative action to enforce them.

Senator ERVIN. Dean, I am trespassing on your time now—almost failing to make a distinction between time and eternity in so doing. But I have a great many decisions I have found that say that Congress can only pass a law which will prevent the State from discriminating. It cannot invade the domain of State legislation and undertake to set up a code itself to do it.

Dean GRISWOLD. All that this law is intended to do, Senator, is to prevent the States from discriminating. It is an affirmative action, designed to that end. And on the findings made, if they are accepted, it is plainly warranted as such an affirmative action to that end.

Senator ERVIN. As I say, it is an invasion of the power of the State—the domain of legislation reserved to the State. I don't guess you and I will ever reach an agreement on that point. But I think that this approach is permissible. I think that the Constitution, which undertook to establish an indestructible Union, composed of indestructible States would fall if Congress would take charge of the whole field, despite the words of the second section of the first article.

But I don't guess I will convince you, and I am sure you are not going to convince me.

I want to thank you, though, for your very friendly discussion of some very serious constitutional questions, as I see them.

Dean GRISWOLD. Thank you, Senator, for the privilege of appearing here.

Do you know, is Senator Keating going to return? He said he would be back at 2 p.m.

Senator ERVIN. I wouldn't want you or the Senator to lose enough weight so we will break through the thin ice of the 13th amendment, while we wait for Senator Keating.

Dean GRISWOLD. Well, I shall wait to see whether Senator Keating returns.

Senator ERVIN. We will call him to see what he is going to do.

Dean GRISWOLD. Fine.

(Short recess.)

Senator KEATING. Mr. Chairman, may I proceed?

I certainly appreciate the courtesy extended to me by the Chairman, and by Dean Griswold. It seems to be an unusually hectic day, and it is necessary to be in two or three different places at one time.

As I understand it, Dean Griswold, during my absence you did give your personal endorsement to the provisions of S. 2979, which was introduced by me, for myself and several others, of both parties to reflect all of the recommendations of the Civil Rights Commission in the field of voting.

Am I correct?

Dean GRISWOLD. Yes, Senator.

Senator KEATING. Have you had an opportunity to examine Senate Resolution 311, the resolution also introduced by us?

Dean GRISWOLD. No, I don't believe I am familiar with Senate Resolution 311.

Senator KEATING. That called for a study of election districts as recommended by the Civil Rights Commission.

Dean GRISWOLD. Well, I would be in favor of such a study, but I don't know the specific resolution.

Senator KEATING. It was sought in the resolution to carry out the recommendations of the Civil Rights Commission. Those recommendations, whatever they are, you support in your individual capacity also.

Dean GRISWOLD. Yes, certainly.

Senator KEATING. I recognize that S. 2979 may need some amendment, and that other limitations, apart from age, residence, legal con-

finement, conviction for a felony, might be justified. I think that corresponds with what I understand is your testimony.

Dean GRISWOLD. Yes. I suggested that it might be that a few more things could be added. I also suggested that I hoped that not too many would be, or we would be letting in the back door what we were trying to keep out the front door.

Senator KEATING. I certainly agree with that.

Is there anything in S. 2750, the administration bill that we have before us, to make unlawful arbitrary inaction where there is a duty to act, which is implied to discourage or prevent Negroes from voting.

Dean GRISWOLD. No, I understand not. As far as this bill is concerned, it would not apply to a registrar who simply took the application and then nothing more was ever heard from him, even though that was done on a discriminatory basis.

Senator KEATING. That seems to me to be a weakness in S. 2750. Certainly the hearings of the Commission indicated that inaction was frequently used to thwart voting rights, perhaps as frequently as actual outright action.

Dean GRISWOLD. Certainly. And that is why I would welcome the substance of section 4 in your bill, Senator. It does seem to me that it would probably be desirable, as in the Civil Rights Commission's report, that where it refers to "or by arbitrary inaction," that there should be perhaps a parenthetical clause saying "where there is a duty to act." And perhaps that is included in the "arbitrary," I don't know. But I would think it would be difficult to make it an offense for you, for example, to do nothing whatever with respect to voting in some place, when it is no part of your function to pass on such a matter.

Senator KEATING. I would agree with that. I think that would be a good addition to the bill, to put in parenthesis there "where there is a duty to act."

You have also pointed out, I believe, that S. 2750 does not affect the election of State officials.

Dean GRISWOLD. That is true. The Commission's recommendations applied to both State and Federal elections. And I think that the constitutional provisions and the constitutional mandate are identical with respect to both of them. I would myself much prefer a statute which applied to both. If the most I can get is one that applies to Federal, I would like to have that rather than nothing.

Senator KEATING. There is no doubt in your mind about the constitutionality of extending it to the elections of State officials.

Dean GRISWOLD. None whatsoever. It is exactly the same ground as the Federal one. Under the Constitution of the United States, discrimination in State elections is just as invalid as it is in Federal elections, and Congress has the same power to enforce the constitutional provisions.

Senator CARROLL. Would you yield at that point?

Senator KEATING. Yes.

Senator CARROLL. What amendment of the Constitution do you invoke in your last statement?

Dean GRISWOLD. Primarily the clauses giving power to Congress in the 14th and 15th amendments—and in my discussion with Senator Ervin I also brought in the 13th, and I still think it gives some color to the picture. But primarily the 14th and 15th amendments.

Senator CARROLL. May I follow along this line for just a question or two?

Senator KEATING. Yes. I would be happy to have the Senator do so.

Senator CARROLL. Just on this point—this concerns me some.

The difficulty, as you know, in the reports and finding the Congress would have to make to this question of the literacy test itself, on Federal officials. If you had to make a choice, I think you have indicated you would only take one step at a time. You would apply it first to those Federal officials.

Dean GRISWOLD. No. If I had to make a choice, I would choose to apply it to both. If Congress makes the choice to apply it only to Federal officials, I would rather have that than nothing.

Senator CARROLL. Now, with reference to section 4 of the Keating bill, which in your opinion is most important, to move ahead on this so-called literacy bill, or the talk about enforcement?

Dean GRISWOLD. I didn't get the alternative, Senator.

Senator CARROLL. Section 4 of the Keating bill had to do with inaction.

Dean GRISWOLD. Well, I think both are very important. I think both are operative today and in many areas it is plain that the problem arises simply because State registrars just don't do anything, or don't do anything very fast.

There is a little book out based on the *Tuskegee* case. The book is called "Gomillion Against Lightfoot." It is by a popular author. I understand the material first appeared in the *New Yorker*. It simply recounts the story of the effort of college graduate Negroes in the Tuskegee area to try to get registered down there. And it is simply a story of long continued delays and nothing ever happening. This is not a question of applying literacy tests. It is a question of simply failing to perform their duties under State law.

Senator CARROLL. Well, Dean, if we simplified the literacy tests, as you indicated in your statement—I wasn't here this morning, but I have read your statement—wouldn't this eliminate that type of inaction?

Dean GRISWOLD. No, I am afraid it wouldn't, Senator. I wish it would. But we would still then have the man applying to vote, and the regulation prescribes that he present a certificate from the school committee that he has completed the sixth grade. He then spends a year and a half trying to get that certificate, during which time his letters are not answered, and then when he goes down, they say, "Oh, yes, we got that, but it is misfiled." Then the certificate comes and it has somebody else's name on it, so he cannot use it, and he has to start back and get it over again. And then finally after a very long time, maybe he gets his certificate. He takes it into the registrar. The registrar says, "Well now you sign this and you sign this and then you leave it with me, and then I will have the board consider it." And nothing ever happens. He goes back and he talks about, "Oh, we mislaid that." And nothing ever happens.

I think that is a very real part of this problem, which won't be dealt with by the literacy test at all. I would be glad to see that part of it dealt with, too, as section 4 of Senator Keating's bill does do. All I say is that the literacy test is a step in the right direction.

Senator CARROLL. That is the point I want to bring out. In other words, to move in this field, we ought to move together, literacy test, and this other too.

Dean GRISWOLD. That would be my view. There are always political judgments that you gentlemen are wiser about than I am. Sometimes you can get part of what you would like to have, but as a practical matter you cannot get all of it. And I would like to get all that it is feasible to get in this area. For myself, both matters, both literacy and failure to take required official action are serious problems in this area.

Senator CARROLL. Let me turn the question around just a little bit.

If we could only get one of these—either the literacy test or section 4, which do you think would be the most helpful at this time? I am asking your opinion now, not only as a very able dean, but as a member of this Commission. Which do you think would be the best?

Dean GRISWOLD. I certainly cannot speak for the Commission on that, since it has taken no action. It has recommended both.

If forced to a choice, I think I would take the literacy test—perhaps more because of its symbolic significance, and with the feeling that if we got that, we might then have a better chance to get the other sometime—whereas if we got the inaction one, it is inherently technical, it doesn't have much crowd appeal. And it seems to me we would be less likely to get the other one, if we took the inaction first.

Senator CARROLL. I thank the Senator from New York for yielding. I want the record to show that I would clearly support the position of Dean Griswold on this. If we could get them both together, I think it is a very sensible intelligent approach, and if we cannot, I would certainly take the literacy test first.

Dean GRISWOLD. Thank you, Senator.

Senator KEATING. I thank the Senator for his comments.

Dean Griswold, Congress has enacted a great deal of legislation in recent years to protect voting rights. It has been said here by some that we don't need anything more, because we have enacted so much in the past.

Tell me why aren't these new laws adequate?

Dean GRISWOLD. I think—in the first place, I would like to deny a little bit. I think they are working to some extent—not nearly enough, but every gain here is important. But I think that I would say that my answer to your question is that, it is the difference between retail and wholesale. The existing legislation largely requires every individual to conduct an independent litigation with respect to his denial of the right to vote. This legislation, at least the literacy part, would eliminate the probability of any type of unreasonable delay in the area, with respect to a large number of voters—perhaps millions. And therefore it would be a big step forward, instead of the few steps forward which so far have been possible under the existing legislation.

Senator KEATING. Does the Civil Rights Commission ever refer cases or complaints which come to them to the Department of Justice for prosecution?

Dean GRISWOLD. Well, I understand, yes. I have only been a member of the Commission since August, so that I am not personally

aware of what the practice was for the 3 years preceding that. But I know that information is referred to the Department of Justice.

Senator CARROLL. Would the Senator restate that question, please?

Senator KEATING. My inquiry was whether the Commission referred cases of complaints or matters that came to their attention to the Department of Justice for prosecution.

You have had total cooperation from the Department of Justice?

Dean GRISWOLD. Oh, yes. We try to cooperate with them. And if the investigations which we are authorized to make disclose criminal or illegal action, it would be our duty to refer them to the Department of Justice. We have no power to prosecute, and of course do not undertake to do so.

Senator KEATING. I have always been interested, Dean Griswold, in the problem of electoral reform, apart from any question of discrimination. Will the Commission concern itself in any way with such related issues as the electoral college, the adoption of uniform residence laws, multiple days for voting, and other issues which stand in the way of a maximum participation of all qualified Americans in the electoral processes, or will they limit themselves just to matters of discrimination?

Dean GRISWOLD. I would find some difficulty in thinking that the jurisdiction of the Commission extended to all of those things.

Under the statute, the Commission has power to investigate denial of the right to vote. Some of these things may have some relation to denial of the right to vote. I think I can say that the Commission, in its judgment, rightly or wrongly, has felt that other bases of denial of the right to vote were currently more numerous, more pressing and more important, and were of a very large order, and that it has not undertaken to go into these other matters. It certainly does not have any general jurisdiction over the electoral processes, and I should think, for example, things such as the electoral college were quite beyond the scope of any power of the Commission, either to investigate or to recommend.

Senator KEATING. So far as you know, has there been any discussion or is the Commission planning any additional work in the area of apportionment in the light of the Supreme Court's decision Monday?

Dean GRISWOLD. There plainly has been no discussion, because I have not seen the opinion, and I dare say no other member of the Commission has seen the opinion. Obviously there has been no action by the Commission.

Senator KEATING. Do you have any estimate of the number of people who have been disenfranchised by unreasonably administered literacy tests—total number?

Dean GRISWOLD. No—except to say that it is a large number. It is not incidental and sporadic, but in some areas it is general.

Senator KEATING. Would you be able to give an estimate as to the number of additional citizens who in your judgment would be eligible to vote if all the recommendations of the Commission in the field of voting were enacted?

Dean GRISWOLD. No. I am sorry, I just do not have the factual data to give a numerical figure. Again, it would be a substantial number.

Senator KEATING. Certainly we have benefited from your testimony, Dean Griswold. You are a distinguished student of law, distinguished in so many fields that it would be impossible to enumerate them all. I am very happy personally to know that you are a member of this Commission and very grateful to you for the testimony which you have given. I am very grateful to the chairman for allowing me to intervene.

Dean GRISWOLD. Thank you, Senator.

Senator CARROLL. I would like to ask a few questions and I will do it quickly because I understand that you want to catch a plane.

Dean GRISWOLD. I am at your service.

Senator CARROLL. I would not want you to miss your—

Dean GRISWOLD. That is all right, if I don't make it I will get another one.

Senator CARROLL. I have only a few questions.

I will refer to page 2 of the statement that you presented this morning, where you say that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of race or color; and you also say that literacy tests and other performance examinations have been used extensively to abet arbitrary and unreasonable denials of the right to vote.

Does the record show at this time anything in support of that? Have we had for the record statements of findings from the U.S. Commission on Civil Rights?

Dean GRISWOLD. That language is based upon findings in the report of the Civil Rights Commission, this [exhibiting] 1961, volume I, relating to voting, the Commission having been expressly authorized by Congress to investigate and report on these matters and the article in the report is based upon hearings held by the Commission which are summarized in the report and the full stenographic transcripts which are available to the Congress.

Senator CARROLL. If I am not mistaken, Dean Griswold, this report has been considered and is in the Congressional Record—I believe that is correct, or at least a summary of the report has been printed if the report itself was not.

Dean GRISWOLD. I would be sorry if it had been, because this is a large volume.

Senator ERVIN. May I interject to say that it has been printed and made available.

Senator CARROLL. Thank you. Now, I believe in September there were recommendations made, and if they are not in the Congressional Record—

Dean GRISWOLD. That report, that was about October 1961 and this is the report that contains the findings and recommendations with respect to voting.

Senator CARROLL. What I wanted to do, Mr. Chairman, is merely for the record ask that we take some sort of legislative notice of what was in that Commission's report so that we will have facts upon which to predicate our findings.

Dean GRISWOLD. Yes, Senator, and we have, also, findings made in a substantial number of reported judicial decisions which also support these findings.

Senator CARROLL. And if there are any other statistical data that the Commission wants to send up which would be helpful in debating

this legislation when it comes before the Congress, I know it will be appreciated. I think that you have pointed out very clearly on page 3 of your testimony that if these findings were substantiated it would be the basis for questioning the propriety and validity of the proposed legislation, and that is why I have devoted these few questions to this matter.

Dean GRISWOLD. Well, I think that since the findings are thoroughly substantiated by the report of the Commission and the hearings upon which that report is based—

Senator CARROLL. It seems to me that in view of Senator Keating's inquiry as to how many people are being discriminated against, that if there is additional information that the committee could have, it would be beneficial for the record.

Dean GRISWOLD. It certainly would be, but I know of no information that the Commission has which would lead you to make a statement such as to say, specifically, that there are 1,752,289 people who have been deprived. But the evidence is clear that a very large number have been systematically deprived. But I cannot tell you, and I don't think the Commission can tell you, how many.

Senator CARROLL. One further question along this line—to refresh my memory—for as Senator Keating has indicated, we have so many bills and matters under consideration now, that we have to refresh our memories as we go along.

Section 4 of the Keating bill, How would that right be enforced and how would it differ from the enforcement provisions today? What is the difference?

Dean GRISWOLD. Well, section 4 of the Keating bill is an amendment of section 2004 of the Revised Statutes which is title 42, section 1971, of the United States Code and it amends subsection (b) of that section.

Now, I do not have the Revised Statutes before me, but I am quite sure that other subsections in that area provide that whoever violates this shall commit a crime and if there is a violation the courts shall have jurisdiction to make appropriate orders to eliminate the violation. I do not think that the enforcement needs to be in Senator Keating's bill because his provision here is an amendment to existing law which has sanction provisions in it.

Senator CARROLL. Well, I was under the impression that today, if there is on the part of an individual a violation—that is, if his rights were being violated, he has access to the Federal courts to give him protection.

Dean GRISWOLD. Yes, except the legislation as it now stands, as I understand it, does not refer specifically to the vote as would be the case if Senator Keating's amendment were to be adopted. It applies to civil rights, generally. I think that would include the right to vote, but this particular provision would make it explicit, that action or inaction leading to denial of the right to vote came within the provisions of the existing Federal statute.

Senator CARROLL. So it is, in effect, a clarification?

Dean GRISWOLD. It is a clarification, but one which I think experience shows would be very helpful.

Senator CARROLL. Another question, and this is one coming from certain Members of Congress who say—well, for example, in my own State of Colorado we have no literacy test. Would the passage of this bill now create one for it?

Dean GRISWOLD. Certainly not.

Senator CARROLL. That was my impression, Colorado or other States which have no literacy tests would not be affected at all?

Dean GRISWOLD. Not the slightest; not the slightest.

Senator CARROLL. It would have effect only in those States that have literacy tests. A literacy test has been called a "qualification," but there seems to be considerable argument as to whether it constitutes a qualification.

Dean GRISWOLD. Well, I would call it not a qualification to vote but a qualification on a State's right to eliminate the right to vote which, as experience shows, has been habitually used in a discriminatory manner.

Senator CARROLL. We come to another question that has been raised. It has been raised in the House. This question has been asked: Are we not now forcing our standards upon the States when we impose this qualification on the States? Attorney General Kennedy, I believe on page 48 of the hearings, which are not yet printed, said that under article 1, section 2, the States have the rights to fix the qualifications for voting. And then he says:

We—

we, referring to his Department, I suppose—

are not infringing on that area or on that right; what we are doing is establishing a test for those qualifications which is quite different. We are not establishing qualifications, not attempting to establish the qualifications.

However, as such literacy test when applied in certain areas of the country have been used to prevent people because of their color from voting for this reason Justice has asked that when literacy is to be used as a qualification for voting, the standard to be used shall be the completion of the sixth grade in school.

So, when he says, "We are not establishing the qualifications," it seems to me that remark or comment is not too clear.

Dean GRISWOLD. I would come to the same conclusion but, with all due respect, I would put it differently. I would say that the States still retain the power to fix the qualifications for voting under article I, section 2, but that their power is subject to the limitations now contained in the 14th and 15th amendments and those amendments include powers in Congress to make them effective and Congress can pass legislation such as this in order to effectuate the requirements of the 14th and 15th amendments which are a qualification on the power of the States to set standards for voting.

Senator CARROLL. Well, I am glad to have the question clarified because it has created considerable confusion in the other body, where it was felt by some that we were attempting arbitrarily, in the Congress, to set a qualification.

Dean GRISWOLD. I do not interpret this as an effort by Congress to set qualifications for voting. I interpret it as an effort by Congress to say to the States, "When you set the qualifications for voting you cannot set discriminatory standards and you cannot set qualifications which, although on their face, are not discriminatory, will in fact and in use be used in a discriminatory way."

Senator CARROLL. Just one more question. Isn't it true, however, that most—and I am not an expert in this field, by any means—but

isn't it true that most of the decisions of the courts have been to strike down the discriminatory qualifications? I am thinking of such qualifications as the grandfather—

Dean GRISWOLD. Oh, yes.

Senator CARROLL. Have we in any other time in American history sought to exercise the power of Congress appropriately under the 14th and 15 amendments?

Dean GRISWOLD. I think that it occurred in the Civil Rights Acts of 1869 and 1870 where an effort was made to exercise the power under the 14th and 15th amendments which the court later held went too far because it applied to individual action as well as State action. I suppose that the Civil Rights Acts of 1957 and of 1960, are exercises of the power by Congress among other things to act under the 14th and 15th amendments.

Senator CARROLL. And I think that is fairly important. Congress has exercised its powers under these amendments. Exercise that—

Dean GRISWOLD. Oh, yes.

Senator CARROLL. And Congress has done it before.

Dean GRISWOLD. Congress has done it many times, in my own view, not often enough, and that is one of the places that I would like to see the Congress exercise the power which in my judgment it undoubtedly has.

Senator CARROLL. I thank you very much, sir, you have been very helpful to me and I apologize for not having been here this morning. But I will read over your testimony and I have your brief and I will read the questions submitted to you this morning, and I thank you very much for coming down to help us.

Dean GRISWOLD. Thank you, Senator.

Senator ERVIN. Since our distinguished colleague has referred to Colorado, as a matter of fact, this bill would affect Colorado. It would abolish that provision or that qualification that insane persons could not vote: it would allow insane persons who have a sixth-grade education to vote.

Dean GRISWOLD. Yes, I agreed with you this morning, Senator, and I agreed and I think that some provision should be made here to take care of certain special problems like that.

Senator ERVIN. And also it would prohibit any State that now has no literacy test from trying to establish a literacy test inconsistent with this bill?

Dean GRISWOLD. The only way it would be inconsistent would be that if they denied the vote on the ground of literacy to a person who had a sixth-grade education. Anything else, the States could do.

Senator ERVIN. Well, I will put another question. I want to ask you what percentage of the enrollment in the Harvard Law School is nonwhite?

Dean GRISWOLD. Senator, not as many as we would like to have. I would guess that it is about 3 percent—no, it is not, it is not nearly as much as that, it is not much more than 1½ or 2 percent.

Senator ERVIN. And the Harvard Law School is a national law school, which draws its student from all over the country?

Dean GRISWOLD. That is right.

Senator ERVIN. And the nonwhite population of this country is about 10 percent. I think that you will agree with me that if the

Harvard Law School has less than 3 percent nonwhite enrollment, that would not justify the inference that the Harvard Law School has discriminated against people on account of race or color?

Dean GRISWOLD. No, I don't think so, Senator. There are other factors. There is the matter of entrance requirements and there are economic problems that affect the number that can come to Harvard and—

Senator ERVIN. Well, in any case, wherever we seek to draw inferences from figures, do we not find there are usually or nearly always other factors than just the mere figures that we have to take account of?

Dean GRISWOLD. Senator, any situation involving figures has to be approached intelligently. That does not mean that the figures should not be utilized. They have to be used intelligently, of course.

Senator ERVIN. I certainly appreciate very much, Dean, your coming here, and your extreme patience and your complete willingness to answer all the questions that were put to you. We thank you for that and we hope you have time to catch that plane.

Dean GRISWOLD. Thank you, Senator. I am very grateful to all of you.

(The staff memorandum submitted by Dean Griswold follows:)

U.S. COMMISSION ON CIVIL RIGHTS

STAFF MEMORANDUM, MARCH 1962

Subject: Constitutionality of Legislation on the Subject of Literacy as a Requirement for Voting

In its 1962 Report on Voting the Commission on Civil Rights unanimously recommended legislation to provide: "That Congress enact legislation providing that in all elections in which, under State law, a "literacy" test, an "understanding" or "interpretation" test, or an "educational" test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education."

Legislation related to the Commission's recommendation is now before the Congress. There is ample support in the Constitution for legislation to correct the kinds of abuses to which literacy requirements for voting have been put. For the sake of convenience, relevant constitutional issues are discussed with reference to S. 2750, the Mansfield-Dirksen bill.

A. SUBSTANCE OF THE BILL

Section 2 of the bill defines a "deprivation of the right to vote" to include: "(1) the application to any person of standards or procedures more stringent than are applied to others similarly situated and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico."

In a sense the proposal does not establish qualifications of electors; it merely treats as a deprivation of the right to vote in Federal elections the refusal to qualify any person on the basis of any test, provided he has completed the sixth grade. Narrowly viewed, the provision tells the States that a sixth-grade education qualifies an elector of Federal officers regardless of "any examination, whether for literacy or otherwise," which may be imposed by the States' voter qualification laws.¹

¹The following States provide for literacy as a qualification for voting: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, Oregon, North Carolina, South Carolina, Virginia, Washington, and Wyoming.

B. THE POWER OF THE STATES TO PROVIDE FOR THE QUALIFICATION OF ELECTORS FOR REPRESENTATIVES AND SENATORS

1. Article I, section 2 of the Constitution, provides:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

2. The 17th amendment makes similar provision for the qualification of electors for Senators.

3. Also pertinent is the 10th amendment providing that powers not delegated to the United States by the States are reserved to the States or to the people.

A series of cases illustrates the extent of the power of the States to provide for the qualification of electors. In *Minor v. Happersett* (88 U.S. (21 Wall.) 162 (1874)), the Court upheld a provision of the Missouri constitution limiting the suffrage to males. The power of a State to impose a literacy test requiring the prospective voter to read or interpret any section of the Constitution was upheld in *Williams v. Mississippi* (170 U.S. 213 (1898)). Similarly, the Court validated a provision of the Maryland constitution which required new residents to declare their intention to be a citizen before registering to vote, *Pope v. Williams* (193 U.S. 621 (1904)). The Court approved the constitutionality of the poll tax as a prerequisite to registering to vote, *Breedlove v. Suttles* (302 U.S. 277 (1937)). In a recent case the Court upheld the literacy test imposed by the State of North Carolina, *Lassiter v. Northampton County Bd. of Elections* (360 U.S. 45 (1959)).

Article I, section 2, is not, however, authority for the States to enact voter qualifications for State electors—that right existed prior to and independent of the Constitution. In a sense, article I, section 2, is not a grant of power to the States at all, for the Constitution, particularly article I, concerns the delegation of powers from the States and the people to the Federal Government. Nor does article I, section 2, grant a power to the States in any degree superior to or different from powers reserved to the States by the 10th amendment. This is clear from the Supreme Court's characterization of article I, section 2, and from its description by persons who attended the Constitutional Convention.

The Court considered article I, section 2, in *Ex Parte Yarbrough* (110 U.S. 651 (1884)), where the power of Congress to enact laws to protect the right to vote in Federal elections was in issue:

"The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State." (*Ex Parte Yarbrough*, supra, 663.)

Turning to the 15th amendment to illustrate the nature of article I, section 2, the Court stated:

"The 15th amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States." (Supra, 664.) (Emphasis added.)

Referring again to the right of the States under article I, section 2, the Court in *Lassiter v. Northampton County Bd. of Elections* (360 U.S. 45, 51 (1959)), pointed out:

"* * * while the right of suffrage is established and guaranteed by the Constitution [citations omitted] it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed."

James Madison explained:

"The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention, therefore, to define and establish this right in this Constitution. To have left it open for the occasional regulation of the Congress would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the addi-

tional reason that it would have rendered too dependent on the State governments that branch of the Federal Government which ought to be dependent on the people alone." (The Federalist Papers, Mentor Ed., pp. 325-326.)

Viewed from the standpoint of the Federal Government, article I, section 2, serves to identify the class of persons who shall elect Federal officers: It incorporates by reference those qualified under the laws of the States. Viewed from the standpoint of the States, article I, section 2, is a limitation on the power of the Federal Government to create a different electorate from that created by the States. Properly speaking, then article I, section 2, does not concern a grant of power either to the Federal Government or to the States. The only power involved is the power of the Federal Government to protect its elections. This power of protection is implied from the existence of Federal elections, the subject of article I, section 2. The same considerations apply to the identical language in the 17th amendment. In this connection the Court has said:

"If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption." (*Ex Parte Yarbrough*, 110 U.S. 651, 658 (1884).)

(See also, *Wiley v. Sinkler*, 179 U.S. 58 (1908); *Swafford v. Templeton*, 185 U.S. 487 (1902); *United States v. Classic*, 313, U.S. 290 (1941)). The power to protect the right thus secured is not limited to State action but extends to the acts of private individuals.

Yarbrough concerned private persons who intimidated a Negro from voting at an election for a Member of Congress. The criminal statute's application to private persons was therefore beyond the scope of the 14th and 15th amendments, which reach only State action. The power of Congress to protect Federal elections, even from racial discrimination, exists under article I, section 2, and appears to be independent of authority to do so under the amendments.

C. CONSTITUTIONAL LIMITATIONS ON THE POWER OF STATES TO PRESCRIBE VOTER QUALIFICATIONS

The Constitution contains other important limitations on the power of the States to enact voter qualification laws. These take the form of powers granted to the Federal Government and limitations imposed upon the States.

1. Article I, section 2, has been dealt with above.

2. Article I, section 4, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The Constitution distinguishes between "qualifications" mentioned in article I, section 2, and the "Times, Places and Manner of holding Elections" referred to in article I, section 4. No case has settled the issue of whether there may not be some qualifications which might also be subject to regulation by the Federal Government as affecting the times, places, and manner of holding elections.

3. The 14th amendment is a further limitation upon the States, and section 5 gives the Congress the power to enact legislation appropriate for its enforcement.

4. The 15th amendment is a limitation upon the United States and the States. It provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 empowers Congress to enforce its provisions by appropriate legislation.

5. The 19th amendment imposes a further limitation upon both the Federal and State Governments:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Section 2 empowers Congress to enforce its provisions with appropriate legislation.

6. Two other provisions of the Constitution are relevant, the supremacy clause, article VI, clause 2, providing that the Constitution and laws shall be "the supreme law of the land," and the necessary and proper clause, article I, section 8, clause 18, empowering Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *

D. THE BILL'S FINDINGS AND REFERENCES TO CONSTITUTIONAL POWERS

Section 1 of the bill lays a factual and legal predicate for the proposition that what follows in section 2 of the bill is designed as appropriate legislation. The most important of these facts are the following according to their designations in the text of the bill:

SEC. 1(c). "Congress further finds that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote."

SEC. 1(d). "Congress further finds that education in the United States is such that persons who have completed six primary grades in public school or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship."

SEC. 1(e). "Congress further finds that large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used; that these citizens are well qualified to exercise the franchise; that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources; that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process."

Section 1(f) invokes Article I, section 4 of the Constitution, section 2 of the 15th amendment and the "power to protect the integrity of the Federal electoral process."

It is not clear how any provision of the bill fairly relates to regulation of the times, places, and manner of holding elections authorized by article I, section 4. However, as will be pointed out below, it is arguable that clause (1), section 2 of the bill relates to the "manner" of holding elections. *United States v. Classic*, 313 U.S. 299 (1941). The power of Congress to enact legislation to protect Federal elections, article I, section 2, and the powers to enact laws appropriate to the enforcement of the 14th and 15th amendments are clearly relevant, however.

Article I, section 2, has already been referred to. The scope of the 15th amendment is indicated by cases involving State as well as national legislation. In the cases of *Guinn v. United States*, 238 U.S. 347 (1915), and *Lane v. Wilson*, 307 U.S. 268 (1939), the Court struck down Oklahoma grandfather clauses. Referring to the scope of the 15th amendment the Court stated in the *Lane* case:

"The reach of the 15th amendment against contrivances by a State to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions [citations omitted]. The amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, *supra*, 275.

The Court upheld the Civil Rights Act of 1957 as appropriate legislation for carrying out the purpose of the 15th amendment, *Hannah v. Larche*, 363 U.S. 420 (1960). In still another recent case the Court interposed the 15th amendment between citizens and the power of the State to draw political boundaries under circumstances indicating a purpose to disfranchise voters on the ground of race or color, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Davis v. Schnell*, 336 U.S. 933, affirming 81 F. Supp. 872, the Court overturned a provision of State law requiring a citizen to "understand and explain" any article of the Constitution. The Court found that the purpose of the law was to discriminate and that the administration of the law was in fact discriminatory and therefore within the effective range of the 15th amendment.

E. THE NECESSARY AND PROPER CLAUSE

It is reasonable to conclude that the States' right to prescribe voter qualifications cannot be exercised in any area defined by the limitations of the 14th and 15th amendments. Difficulty arises from the fact that in many of the States whose voter qualification laws will be affected by the bill, there has been no

discrimination. The power of Congress to enact legislation pursuant to a granted power regardless of the fact that such legislation affects objects and persons outside the scope of direct Federal control supports the power of Congress to strike at discrimination despite its effect upon nondiscriminatory State laws.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

In the case of *United States v. Darby*, 312 U.S. 100 (1941), the Court upheld the Fair Labor Standards Act and in so doing approved the control of a purely intrastate activity, manufacturing, as a necessary and proper regulation of interstate commerce.

In *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957), the Court approved the displacement of all similar labor measures affecting interstate commerce despite the fact that the NLRB declined to exercise its jurisdiction. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), the Court upheld provisions of the Federal Power Act authorizing Federal licenses to construct dams, even where the States forbade their construction. While some State dams would be harmless to the national interest, Congress found it "necessary and proper" to take over the control of all damming of streams, "affecting" interstate commerce. Likewise the Court approved the Corrupt Practices Act, which employed the device of regulating campaign contributions.

"If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Burroughs v. United States*, 290 U.S. 534, 547 (1934).

See also, *Everards' Breweries v. Day*, 265 U.S. 545 (1924); *Westfall v. United States*, 274 U.S. 259 (1927); *Ruppert v. Caffey*, 251 U.S. 264 (1920).

F. SCOPE OF THE BILL AND THE EFFECT OF ITS LIMITATION TO FEDERAL ELECTIONS

1. The Mansfield-Dirksen bill is an amendment to the Civil Rights Act of 1957. Subsection (b) of Title 42 U.S.C., section 1971, a part of the 1957 act, concerns threats, intimidation and coercion of persons for the purpose of interfering with their right to vote in Federal elections. Subsection (c) of the 1957 act authorizes the Attorney General to enjoin violations of both subsection (a), which extends to State and Federal elections, and subsection (b).

Subsection (a) is based directly upon the 15th amendment; it concerns only denials of the right to vote on account of "race, color, or previous condition of servitude." The 15th amendment, and therefore subsection (a) implementing it, cover State as well as Federal elections. The limitation of subsection (b) to Federal elections indicates that it is based on article I, section 2 or on Article I, section 4, both of which support the power of Congress to protect Federal elections. Subsection (b) reaches private as well as State action, which is beyond the scope of the 14th and 15th amendments. *James v. Bowman*, 190 U.S. 127 (1903); *United States v. Reese*, 92 U.S. 214 (1875).

The Mansfield-Dirksen bill amends subsection (b) rather than subsection (a). Presumably the limitation of subsection (b) to Federal elections was dictated by a desire to reach violations in the form of economic reprisals, usually committed by individuals and not by persons acting under color of State law. The limitation to Federal elections included in the Mansfield-Dirksen bill conforms to the original scope of the statute. However, there are several reasons why a limitation to Federal elections appears unnecessary, even if subsection (b) is to be amended.

(a) If it is the intent of the bill to rely upon the power of Congress to protect Federal elections (art. I, sec. 2) and to regulate the times, places and manner of holding Federal elections (Art. I, sec. 4), it is not clear why the bill expressly invokes the 14th and 15th amendments. Congress has the power under article I to secure its elections against any kind of abuse. *Ex parte Yarborough*, 110 U.S. 651 (1884); *Ex Parte Siebold*, 100 U.S. 371 (1879); *United States v. Classic*, 313 U.S. 299 (1941). But the fact findings and express reference in the bill to the amendments show an intention to invoke them. The fact that subsection (b) as amended by the bill will reach persons "whether acting under color of law or otherwise" does not mean that Congress is confined to its article I powers. Sub-

section (b) reaches private action in the form of economic reprisals. *United States v. Beatty*, 288 F. 2d 653 (6th Cir. 1961). As amended by the bill, it will still reach private action. In addition it will reach State registration officials. The fact that the law as amended will reach both private and State action does not mean that the law is not based upon the amendments or that it does not observe their limitation to State action. It only raises the question of what powers Congress has acted upon.

It is clear that the bill is based not only upon the article I powers but also upon the amendments. The 15th amendment supports clause (2), section 2 of the bill, which strikes at discriminatory use of literacy and other tests, while the 14th amendment supports clause (1), section 2 of the bill, which guarantees equal protection in the matter of administering "standards and procedures." The power of Congress to act is in each particular, clearly supported by the Constitution. The fact that different parts of the bill are based upon different powers under the Constitution does not, of course, limit the powers, unless there is some basis for assuming that power to do one thing will be used to accomplish another.

The bill's limitation to Federal elections is therefore not because the bill aims at private persons rather than persons acting under color of law. The limitation is not dictated by the amendments. The same powers in the Constitution support appropriate legislation to cover State as well as Federal elections.

(b) Once the legal distinction between these different powers is understood, there is no reason to assume that the court will find that Congress has acted beyond the scope of one power rather than within the admitted range of the other.

(c) No case can be imagined which would involve deprivation of the right to vote by reason of a literacy test which did not also involve the necessary State action.

The Court has consistently found that voting is so integrally a Government function that the concept of State action is broad enough to include private persons not acting directly for the State. *Nixon v. Condon*, 286 U.S. 273 (1923), State executive committee of a political party; *Smith v. Allwright*, 321 U.S. 649 (1944), a State party convention; *United States v. Classic*, 318 U.S. 229 (1941), a party primary; *Terry v. Adams*, 345 U.S. 461 (1953), a preprimary convention, and most recently *United States v. McElveen*, 177 F. Supp. 355 (E.D. LS. 1959), affirmed *sub. nomine United States v. Thomas*, 362 U.S. 58 (1960), a citizens council.

(d) Finally, the Court has shown impatience with arguments based on this limitation of the Civil War amendments. The defendant registrars of voters in the recent case of *United States v. Raines*, 362 U.S. 17 (1960), had argued that the Civil Rights Act of 1957 was unconstitutional for the reason that subsection (b) of the act reached private action. Even though they were sued under subsection (a) of the act, they maintained that they could raise the issue of the scope of the law. To this the Court responded:

"In the exercise of that jurisdiction, it [the Court] is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, *supra*, 21.

2. Clause (1), section 2 of the bill, quoted above, broadens the basis upon which the Attorney General may proceed in voting cases. The bulk of litigation pursuant to the Civil Rights Act of 1957 and 1960 involves discriminatory registration procedures. These suits are based upon the power of the Attorney General to file a civil suit to enjoin violations of subsections (a) and (b) of title 42, United States Code, section 1971. One of the difficulties with subsection (a) is that it imposes the burden of proving that the acts or practices complained of are based on race or color. Clause (1), section 2 of the bill will permit the Attorney General to enjoin the use of different standards for Negroes and white persons without the necessity of proving that the use of such standards is motivated by race.

The use of different "standards or procedures" is not a voter qualification in the sense of article I, section 2, and therefore legislation to curb this kind of abuse is not in any sense controlled by the States. Discriminatory administration of voter qualification laws is within effective range of article I, section 2 as well as article I, section 4. *Ex Parte Siebold*, 100 U.S. 371 (1870).

Direct support for clause (1), section 2 of the bill, however, flows from the equal protection clause of the 14th amendment under which Congress has the

power to enact appropriate legislation. The equal protection clause has been the basis for judicial action to curb discriminatory administration of otherwise constitutional laws. *Yick Wo v. Hopkins*, 118 U.S. 256 (1886); *Davis v. Schnell*, 336 U.S. 933, affirming 81 F. Supp. 872 (1949).

3. Section 1(e) of the bill finds that American citizens who have been educated in a part of the United States where the Spanish language is commonly used are deprived of the right to vote by reason of their lack of proficiency in the English language and that "lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process."

The bill therefore provides in clause (2), section 2, that it will be a deprivation of the right to vote in Federal elections to deny any citizen the vote who has completed the sixth grade of any public school "in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico." This provision, it should be noted, does not limit the law to Spanish.

The New York Court of Appeals on November 10, 1959, upheld the lower court's ruling that a New York resident, a citizen of Puerto Rican birth, was not deprived of his right to vote by reason of the refusal of the election officials to permit him to take a voter registration literacy test in the Spanish language.

"The inspectors of election contended in the court of appeals that distinction between literacy in English and literacy in another language was reasonable and did not violate the 14th amendment, and that the requirement of literacy in English did not violate the 15th amendment because it made no distinction based on race or color. Order affirmed, without costs. All concur." *Camacho v. Doc*, 5 Race Rel. Law Rep. 778, 7 N.Y. 2d 762, 194 N.Y.S. 2d 33 (1959).

The bill's factfindings in regard to the Puerto Ricans avoid reference to race or color. This part of the bill therefore seems to rest upon the powers of the Congress to enact laws pursuant to article I and the 14th amendment. At issue is the power of Congress so acting to substitute its judgment for that of the States in the matter of voter qualifications. This puts the issue in a unfavorable light, but it may be so argued.

The Supreme Court has stated: "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record [citations omitted] are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. *The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot.* * * * Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. * * * It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage (citation omitted). North Carolina agrees. We do not sit in judgment on the wisdom of that policy. *We cannot say, however, that it is not an allowable one measured by constitutional standards.*" *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 51, 51-53 (1959). (Emphasis added.)

However, the bill does not go so far as to outlaw literacy tests; it merely declares that a sixth grade education in any public school, including those of Puerto Rico, is a sufficient demonstration of literacy. Under the bill it would be unreasonable and a denial of the right to vote to impose a higher standard. The bill assures all Americans, whether educated in a State or territory, the District of Columbia, or the Commonwealth of Puerto Rico, of a minimum standard for voting purposes.

Since English is now required in the elementary schools in Puerto Rico, the effect of the bill on New York residents from Puerto Rico will be minimal.

Even if this part of the bill is regarded as an improper exercise of power under article I or the 14th amendment, the severability clause will save other portions of the bill.

Since Congress may clearly impose the standard of a sixth grade education as a necessary and proper means of exercising its powers under article I and the amendments, it is possible that the extension of the standard to all Americans, including those of Puerto Rico, is but a part of the means adopted and therefore without need of direct support in the Constitution.

In conclusion, it appears beyond reasonable doubt that the Constitution supports the power of Congress to act by any necessary and proper means (art. I, sec. 8, cl. 18) to secure Federal elections from any abuse, private or public, which deprives citizens of the right to vote (art. I, sec. 2); that Congress may likewise regulate the times, places, and manner of holding elections (art. I, sec. 4); that

Congress may acting pursuant to the 15th amendment, legislate against abuses which deprive citizens of the right to vote in State or Federal elections on the grounds of race, color, or previous condition of servitude; and, under the equal protection clause of the 14th amendment, secure all elections from discriminator administration of law.

The authority of the States to prescribe the qualifications of electors must yield to the exercise of these substantial powers. Finally, against generalized claims of interference with States rights, one further provision of the Constitution (art. VI, cl. 2) should be cited:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Mr. CREECH. Mr. Chairman, the next witness is the Honorable William Old, judge of the 37th Judicial Circuit of the State of Virginia.

STATEMENT OF HON. WILLIAM OLD, JUDGE OF THE 37TH JUDICIAL CIRCUIT OF THE COMMONWEALTH OF VIRGINIA

Senator ERVIN. Judge, we are delighted to welcome you to the committee, and we appreciate very much your coming here.

Judge OLD. Thank you, Senator. Shall I read my statement?

Senator ERVIN. Yes.

Judge OLD. The issue posed in Senate bill 2750 and Senate bill 480 is of fundamental importance in government under the Constitution of the United States. The question is whether Congress can, pursuant to any delegation of power contained in the Constitution, prescribe the literacy or intelligence qualifications for the exercise of the franchise. Or is this a matter for the States to determine?

In the original Constitution the only officials of the Government of the United States who were to be elected by popular vote were the Members of the House of Representatives. The electors or voters for the Members of the House of Representatives were explicitly prescribed by article I, section 2, paragraph 1, as follows:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

I doubt whether anyone would ever hold that the framers of the Constitution had the slightest intention to vest in the Government of the United States any control whatsoever over the qualifications of the voters who should be designated by State law to choose the Members of the House of Representatives. Article I, section 3(1) provided for the choice of Senators:

The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

That original requirement for the election of Senators is not susceptible to any interpretation which could make the electors of the two Senators of a State other than the members of the legislature. This is of importance because S. 2750, by section (f) thereof, bases the authority of Congress to make the enactment in part upon article I, section 4, of the Constitution. This provision reads as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The contention that article I, section 4, has any efficacy whatever in empowering Congress to determine who should be qualified to vote for Senators or representatives cannot be sustained. Certainly Congress could not "at any time by law make or alter" the explicit requirement that the two Senators of a State be chosen by the legislature thereof. Congress, having no power to determine who should constitute a State legislature, could make no law affecting the persons qualified to choose the Senators of a State. Since the provision is applicable equally to Senators and Representatives, it can have no efficacy regarding the electors or voters for Representatives, who are explicitly designated to be those having the "qualifications requisite for electors of the most numerous branch of the State legislature."

The words, "The times, places and manner of holding elections for Senators and representatives" simply have no reference to the qualifications of voters, and the provisions regarding Congress simply empowers it to establish a uniformity among the several States as to times, places and manner.

The Constitution has no requirement as to how a State shall appoint its electors for President or Vice President. Article II, section 2(1), is the only provision in the Constitution, or any amendment thereto, which relates to the appointment of electors for President or Vice President, and that explicit provision reads as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress, but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

It is to be noted here that the 12th amendment does not have any reference to the appointment of such electors. Thus, the above-quoted provision exists now in the same language that came from the Philadelphia Convention of 1787. Plainly, a State does not have to choose its electors by popular vote, insofar as the Federal Government is concerned, but, unless inhibited by some provision of the State constitution, the State legislature may appoint the electors of its State. Of course the legislature is prohibited from appointing a "Senator or Representative, or person holding an office of trust or profit under the United States."

It is apparent that the original scheme of the Constitution, and the intention of the framers of the Constitution, was that the Government of the United States should have no power to interfere with the process of the franchise either with respect to State officials, legislative, executive or judicial, or with respect to Senators and Representatives or regarding the appointment of electors for President or Vice President. The bills here under consideration do not seem to predicate an assumption of power by Congress on the original Constitution, except that S. 2750 does refer to article I, section 4, as constituting such a grant of power. S. 2750 also predicates the assumption of congressional power on section 5 of the 14th amendment and on section 2 of the 15th amendment. S. 480 asserts that the enactment is—
necessary to make effective the guarantees of the Constitution, particularly those contained in the 14th and 15th amendments.

Fourteenth amendment: It seems quite clear that the framers of the 14th amendment did not consider that the provisions of section 1 of the amendment in any way involved the qualification of voters.

The language of section 2 is inconsistent with the hypothesis that the provisions of section 1 in any way interfered with the plenary powers of the State to fix the qualifications of voters. While section 2 sought to discourage any State practice which would deny the right to vote to a large and ascertainable body of voters (obviously the colored race) reducing representation in Congress, it did not forbid such practice. In fact, the 14th amendment and the Reconstruction legislation was not designed to enlarge the right of franchise, but was designed to confine the right of franchise to the Negroes, carpetbaggers and scalawags, and to deny the right to vote to white people because they had served and supported the Confederate States of America.

Senator ERVIN. Judge, may I interrupt here to ask you a few questions?

Judge OLD. Yes, sir.

Senator ERVIN. And to refer you to some citations of cases before the Supreme Court, one being the case reported in 146 U.S., page 1, and the case against the Northampton County Board of Elections referring to the 14th amendment, holding that the right of a person to vote was a right to vote as established by the laws of the State.

Judge OLD. I think that is unquestionably clear and I think it is unquestionably clear that the contemporaneous construction of the 14th amendment at that time had no relationship to the—as a matter of fact, they did not attempt to support the governments of the States, of the reconstructed States or the succession States to quality, they came down with arms and took over the governments of the States, that is exactly what they did, and it is difficult for me to see how the 14th amendment can be construed to be an amendment which sought to enlarge the right of a franchise, it sought to restrict the right of franchise by disqualifying all white people, all people who had taken part in or supported the Confederate States and under this program, Robert E. Lee was disenfranchised. Now, that kind of an action that would disenfranchise a noble character like Robert E. Lee certainly is not designed to enlarge the right to the people to vote—

Senator ERVIN. If I remember correctly, he remained disenfranchised to his death.

Judge OLD. Yes, he remained disenfranchised to his death, and I heard some years ago there was some movement to posthumously re-franchise Robert E. Lee—I think they'd better leave Robert E. Lee alone.

Senator ERVIN. Thank you. Will you proceed with your statement?

Judge OLD. Under this program Robert E. Lee was disenfranchised. Section 5 of the 14th amendment reads:

The Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

Of course, that section cannot properly be construed to vest any power in Congress not provided for in the preceding four sections of the 14th amendment. This amendment was proposed by Congress, without representation from the Southern States on June 13, 1866, and was declared ratified by Secretary of State Seward, in a rather indefinite proclamation, on July 21, 1868. The Congress which convened in December 1868, certainly did not consider the 14th amend-

ment to be effective in the field of voting rights, otherwise that session of Congress would not have proposed the 15th amendment for ratification on February 26, 1869. This amendment was declared to be ratified on February 17, 1870, and reads as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Under the 15th amendment any law made by Congress or by any State denying or abridging the right of a person to vote on account of race would be unconstitutional and void. It has nothing to do with literacy tests or other qualifications for the exercise of the voting privilege.

And I would like to say here that if the making of a literacy test is not a qualification or the setting of a qualification as the learned dean indicated just a while ago, what in the world could it be? Suppose that they should—if you disqualified anybody from voting regardless of what his intelligence is, that is a denial, that has a race connotation, it is that, and it seems to me it is entirely wrong—

Senator ERVIN. It goes more to the mental qualifications than to the educational qualification, but there is no relationship to—

Judge OLD. To race.

Senator ERVIN. A denial to vote on the basis of race or color or previous condition of servitude.

Judge OLD. I think that is unquestionably true.

Senator ERVIN. And the Supreme Court of the United States has held, as you know, Judge, that the Congress has no right to adopt legislation with reference to the States except on the basis of the 15th amendment and that in the case of the 15th amendment it is empowered to do nothing beyond taking steps concerning discrimination against the man on the basis of race.

Judge OLD. In the case of a right of the State, not the individual.

Senator ERVIN. Yes.

Judge OLD. The 17th amendment was proposed by Congress on May 13, 1912, and was declared ratified on May 9, 1913, and contains the following provision:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

The 17th amendment was adopted more than 40 years after the reconstruction amendments were forced into the Constitution. Yet, on the question of who should elect the Senators, the 1912 Congress used the same language which was used in the original Constitution in article I, section 2. So, with reference to both the Members of House of Representatives and of the Senate, the voters are those in each State who—

shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The one thing that stands out in the Constitution and the amendments thereto is that the qualifications of voters in the respective States shall vary in accordance with the varying conditions and circumstances

in the several States. The framers of the Constitution sought at all times to keep the cold, clammy hand of rigid and compulsive conformity, from the throats of the States.

S. 2750 contains the following provision:

(c) Congress further finds that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote.

I doubt whether we will ever have utopia on this earth. These bills are directed at the Southern States. They are intended to give to the executive departments of the Federal Government color of right to descend upon the Southern States with thousands of Federal snoopers to stir up racial strife whenever the exigencies of political conflict require that the South be lashed to appease the voters concentrated Harlems of the great northern cities. It well may be that in many areas of the South qualified Negroes deliberately refrain from seeking to register in order to avoid pressure from the NAACP and the Federal snoopers.

S. 2750 further provides:

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose in any Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election.

Where in the Constitution can any one find language to base a contention that any such plenary power has been delegated to Congress? During the last decade Congress has remained the only bulwark against the destruction of the sovereign and reserved powers of the States. During these years there have been members of both Houses of Congress who have advocated unconstitutional legislation in order to lash out against the South. The attempts of these extremists have been repudiated by Congress whenever full debate has disclosed their nefarious ends.

It has been the Supreme Court and the Executive Department that have usurped the powers of Congress and of the sovereign States, in violation of the Constitution. As bad as the situation has been since May 17, 1954, how much worse it would have been had Congress joined with the Supreme Court and the Executive Department in the headlong purpose of those departments to destroy the States.

I doubt whether any State will be able always to perform in a perfect way on this question of voting. Now, I can say many things, but I don't know, my experience is only in Virginia, but I think that we in Virginia, we probably have less corruption or anything dealing with votes than any State in the Union.

I remember where certain precincts in Chicago, I think, where they had something like 24 voters registered and they voted 71. We did not have anything like that in Virginia.

And I can see nothing in any of these attempts, no purpose on the part of Congress to attack those things, no purpose at all, but you let something happen in the South and then you see the whole bunch of people jumping down the throats of the South, and I don't know

how many people feel about it, but I want to tell you and I will tell you, I think the time is coming when the southern people will be at the end of their patience about this. We have been pretty patient.

Senator CARROLL. Mr. Chairman, may I ask some questions?

Judge OLD. Yes, sir.

Senator CARROLL. Judge, I noted your reference to "Utopia" in your statement. Now, this 15th amendment was approved almost 100 years ago.

Judge OLD. 1870.

Senator CARROLL. And yet still we are looking for a solution—

Judge OLD. Well, I hope that there will be a solution that would try to come to some kind of a harmony with the situation existing in the South but, as I see it, the solutions so far presented have been solutions of utter compulsion and an attempt to bring the South under the forces of the same kind of reconstruction, almost, well, almost as vicious as the original reconstruction and—

Senator CARROLL. Wouldn't you say, Judge, under the 15th amendment, that the purpose of that amendment was to stop racial discrimination, wouldn't you say that was its purpose?

Judge OLD. I think so, and I also think—

Senator CARROLL. Its words are so clear. Section I of that article states that the rights of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Judge OLD. I have stated before that I think that if a State passed a law which prevented a person from voting by such law on account of his race, I think it would be undoubtedly void under the 15th amendment.

Senator CARROLL. You see, Judge, if the information that has come to us is correct—and here we have, for example, a statement by the Attorney General—that in the year 1959 there were 16 counties in which the Negroes were in a majority and where there was not one Negro registered to vote and—

Judge OLD. And did he say whether they had asked to be registered?

Senator CARROLL. Well, I will come to that.

Judge OLD. All right.

Senator CARROLL. And 49 other such counties where Negroes were a large percentage and where fewer than 5 percent of the eligible Negro citizens were registered.

Now, this is the sort of information which is coming in to us and I have in mind—

Judge OLD. But have they asked why? And did they ask to be registered?

Senator CARROLL. And we had one case, and I will supply the title of it later, where there was a three-man Federal court in Louisiana and in that particular case there were 26,000 whites and 14,000 Negroes and the evidence brought before that court was that although Negroes had tried not one was permitted to be registered in 30 years and—

Judge OLD. How many had tried?

Senator CARROLL. Well, the evidence before the court—

Judge OLD. Just how many had tried?

Senator CARROLL. Well, I don't know whether it was one or two——

Judge OLD. And what were the qualifications of those that had tried?

Senator CARROLL. This is one of the instances that have been coming in to us, anyway.

Now, coming to the 15th amendment, section 2——

Judge OLD. Yes.

Senator CARROLL. If this evidence is right, and if this discrimination is widespread, would Congress have the power to enforce this article by appropriate legislation to correct——

Judge OLD. That is, to enforce the States? Enforce the States?

Senator CARROLL. To correct——

Judge OLD. Suppose individuals should restrict the vote, do you think then that——

Senator CARROLL. I didn't quite hear you. Supposing what?

Judge OLD. Supposing individuals should use some restrictive measures, not the States?

Senator CARROLL. This happens in many States—but when the State itself sets up standards which it is alleged, if these findings are true, are used to keep hundreds or thousands of Americans from voting because of race or color, then corrective action should not be considered a punishment of the South but——

Judge OLD. It is a punishment on the South.

Senator CARROLL. I hope it is not.

Judge OLD. It is, but it is true, and all of these legislations have their main purpose to get at the South and——

Senator CARROLL. You see, there are other areas. There are some areas in the West, for example, where there has been discrimination against the Spanish-Americans.

Judge OLD. And against the Indians, I suppose.

Senator CARROLL. In my own State, for example, I suppose that we must have over 100,000 Spanish-American people and they are permitted to go in and vote just as anyone else. Now, we have had cases in the Supreme Court that came from other States that involved Spanish-American people. There are areas where these people cannot vote and—how can we get these people the vote——

Judge OLD. I take issue with you, sir, you say how can we get them to vote, and I ask you, how can you get them to vote if they don't want to vote?

Senator CARROLL. Well——

Judge OLD. Well, suppose that they don't want to register because if they were to register then they would be hounded by representatives of all of the pressure groups like the NAACP and these Federal snoopers coming down and bothering them, and supposing that they would rather not be bothered, and has there been any effort on the part of those who are proposing this legislation to determine how much of that there is and——

Senator CARROLL. Well, Judge, you cannot force anybody to vote.

Judge OLD. I am quite sure you cannot.

Senator CARROLL. But this is a way to make it at least possible for them to vote. We have many people in my State who do not vote, and they are not colored people, they are white people who don't register for the vote.

Judge OLD. I think we all have that.

Senator CARROLL. But the point is that they have the opportunity and there are no blocks to their rights to register.

Judge OLD. Well, the trouble with all of this, and I think that this is correct, the press has blown this thing up terrifically—but I have yet to find any kind of detailed statement of how many people have been deprived of voting, just how many people have offered to register or tried to register and been refused.

Senator ERVIN. Judge, on this point, if I may interject to get it in the record, may I point out that our distinguished Senator from Colorado has corroborated what you have said, when he says that there are a lot of white people in Colorado who will not register and vote. You were just saying that a lot of the colored people down South do not want to vote; they are both on the same plane.

Judge OLD. Senator, I feel awfully strongly about this, I feel very sorry for the colored people in the South. They are hounded by the press and by the Federal snoopers and by pressure groups like the NAACP.

Sir, I tell you, I have a great respect for the way in which the great majority of our colored citizens have acted and—

Senator CARROLL. I want to state for the record and to just clarify it, I do not want our distinguished chairman to misinterpret my remarks as a proof of what our able witness has stated. I am merely saying that this is true not only in my State of Colorado but every State in the Union, we do not ever get 100 percent of the voters, we do not get 100 percent registration of the adult voters at all. But my point is that in my State they have the opportunity to register and they have the opportunity to vote.

Judge OLD. Well, Senator, I will say that beyond any peradventure, they have the right to vote in the Commonwealth of Virginia as I am sure that in the Senator's great northern State they have an—

Senator CARROLL. Well, I will take issue with you on the matter of the opportunity—as I was saying, we have this evidence that has been coming in to us. From the Civil Rights Commission's report, the testimony has shown that in certain areas there seems to be a pattern of discrimination as to the people who had a vote. We have heard evidence of people who wanted to register, and who wanted to vote, but who according to this testimony, were denied the opportunity. They are being denied the right to register and the right to vote, and I think that is wrong and I think that we should seek to correct it and—

Judge OLD. Do you believe that there is any area in this country where if you made a determined effort to analyze certain individuals with reference to whether they can register and vote, that you would not find some that could not?

Senator CARROLL. Well, I wonder but I suspect—

Judge OLD. I am quite sure.

Senator CARROLL. You are sure, but I suspect that—

Judge OLD. I am quite sure.

Senator CARROLL. I also suspect that you would not find the sort of evidence that comes in from—

Judge OLD. I think this—of course, I have many very close and fine colored friends, many close and fine colored friends. And I have a situation, I had a situation which happened to me, in which a colored friend of mine whose wife was taken ill and he had to take her to the hospital. Now, he didn't call up any attorney for the NAACP to come down with a Cadillac and carry her to the hospital. He asked me to carry her to the hospital, he knew I would do it in my Chevrolet.

Senator CARROLL. All I can say is that there are people who are under these conditions and denied the right to vote. I know that in my own State if only 100 people were denied the right to vote, why there would be sort of a political revolution. The people would not stand for it and the newspapers would take it up. To be specific, we have Spanish-American people there, and if these Spanish-Americans, even though they are in the minority, if they were denied that right, why our people would rise up in arms against any such effort to keep them from voting and—

Judge OLD. Suppose there was an institution existing in the city of New York that exercised pressure upon the colored race, and they would be exercising their pressure to vote their way, without any regard for any consideration of voting for what is best for the country, and this institution attempts that same policy in the Commonwealth of Virginia, trying to get them to vote their way rather than what is best for the Commonwealth of Virginia, would you then say—I don't mean deny them the right to vote but to vote in such a—

Senator CARROLL. Well, I think that is a different question, because we know that in our society pressure groups are working all the time. No doubt about it. Their efforts are not always in the national interest, and that is true whether it is up North or in the city of New York or in Colorado or—

Judge OLD. Let me give you an instance. We had just this last May 20, in Prince Edwards County, in Farmville, the situation where the NAACP, they came down there with a big flash and they asked for permission to hold a meeting on the steps of the courthouse itself, which was granted, and they came there.

It was a very tremendous attempt on their part to create and to stimulate racial strife—and the white people just stayed away and there wasn't a single incident and these people were absolutely frustrated on account of it. The Negroes there, I would say that certainly two-thirds of them came from outside Prince Edwards County and they were completely frustrated because the white people of Farmville and Prince Edward just simply stayed right away and there was not the slightest violence of any kind. Now, these people came down there for the very purpose of creating violence, so as to blow it up.

Senator CARROLL. That may be a conclusion which is—

Judge OLD. It is true, sir.

Senator CARROLL. There is no proof of that, that is a conclusion of your own. The basic point here is that each individual who can qualify ought to have the right to register and vote and not be denied because of his race or his color. I don't care what his race is or what his color is, if he is an American and otherwise qualified, he is entitled to register and vote.

Judge OLD. Not unless he wants to.

Senator CARROLL. Well——

Judge OLD. And there has been absolutely no testimony so far as I can see or that I have seen which would indicate that any substantial amount of either white or colored people—that had been disenfranchised—and they say that because in certain counties, and we may have some in our State, in which the Negro vote is very small—but not because of any restriction but because they have not asked to vote. You don't think that we should corral them up and try to force them, do you?

Senator CARROLL. I was on the point of asking you—I think that you and I agree on the 15th amendment——

Judge OLD. I think that is true.

Senator CARROLL. And where we might not agree is whether or not——

Judge OLD. And my point on this proposition comes down to this. As far as I can see in any proposition with reference to the election rights, rights to voting, that all of this, all of these bills, they are all great attacks by the press and others, they are all directed at southern people and they are not directed against other areas of the country which may not have exactly the same type of thing that we have here, and I don't say that just because—but where in Congress or elsewhere if you had all of this about trying to prevent the great city bosses from denying the right to people to vote or seeking to prevent them from being corrupt—I know there is as much more of that up there and elsewhere, than there is in the South and yet the ire is directed only against the South and——

Senator CARROLL. I was not speaking of corruption——

Judge OLD. But corruption, it is undisputed that it exists and yet no effort——

Senator CARROLL. There is no doubt that corruption is undesirable, but that is another thing. I am asking——

Judge OLD. But my point is that the Congress and the Federal Government, they do not go out against that, they only——

Senator CARROLL. Well, I appreciate your answers, sir.

Judge OLD. Yes.

Senator ERVIN. Judge, I want to ask you a few questions.

You and I, I think, we are objecting to these bills because they do not attempt to prevent discrimination on the basis of race or color or previous condition of servitude, but we object to these bills because they undertake to establish a Federal standard, in this case a Federal educational standard so as to rob all of the 50 States of their power to prescribe a literacy test; isn't that so?

Judge OLD. I think so. I think that the States have got the right to protect themselves from an electorate that is unintelligent.

Senator ERVIN. I don't think I have here a copy of the administration bill that was cosponsored in the Senate by the minority leader, but I will ask you about the operating part of this law. There is not a word in there that has any relationship whatever to the denial of the right to vote on account of race or his previous condition of servitude.

Judge OLD. I did not see anything in there, I think they did have some statement in there that there had been some abuses but——

Senator ERVIN. Well, that is in the preamble.

Judge OLD. I think it was in the preamble but not in the action part.

Senator ERVIN. And the preamble has a lot of "whereases" and factual recitations by the drafters which they hope to separate from the legislation because it cannot quite be sustained on the Constitution itself—isn't that right?

Judge OLD. That is right.

Senator ERVIN. And it undertakes to condone letting Congress exercise a judicial power, in effect, the power to find a verdict.

Judge OLD. That is right.

Senator ERVIN. And, according to this bill, it is only directed against seven Southern States.

We have had some controversies with other people about whether you can contradict the truth of these recitations but this is not the function of the legislative body, is it? It is the function of the legislative body to legislate, but can a legislative body legislate with respect to what the truth is?

Judge OLD. I don't see how in the world they can arrive at what the truth is; I don't see how they possibly could arrive at it. They might take the Civil Rights Commission—well, they are very anxious to find something of a deleterious character in the South, I think that is their purpose, because otherwise—

Senator ERVIN. They would be put out of business?

Judge OLD. They would be put out of business if they did not, and if they did not put out something that would incite the press, it is nothing but an attack upon the South and they still—

Senator ERVIN. Judge, I am going to call your attention to some cases. Here is one reported in 7 Georgia 88, page 92, where the Court is dealing with a State act which has a preamble, and where the legislature tried to say what the truth was. About that, the court said that:

The legislature has no power to legislate the truth of facts. Whether the facts are true or false is an inquiry for the court to make on the legal form, it belongs to the judicial department of the government.

Now, I want to ask you this. In your judgment as a lawyer and a jurist, when the Congress attempts to declare in a legislative act what the truth is with respect to questions of fact, and attempts to deprive the courts of the right to determine those questions of fact, isn't the Congress in so doing violating the provisions of the fifth amendment which prohibits the Federal Government from denying a litigant the right of due process of law?

Judge OLD. I don't think that Congress can deny due process of law.

Senator ERVIN. I would like to call your attention to this statement from the greatest writer on evidence that this country has ever known Dean Wigmore, in section 1353, says it is one thing—in other words, that it is one thing for the Judiciary, while exercising in its own way its constitutional powers, to refuse to reach its determination, but it is quite a different thing for the Judiciary to exercise its power in a certain classification. The judicial function under the Constitution is to apply the law in controverted cases, and applying the law necessarily involves a determination of facts, and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of a judicial function. Do you agree with that statement?

Judge OLD. I agree with it. I think that is uncontrovertedly true.

Senator ERVIN. And I would like to call your attention to the case of *Heiner* reported in 285 U.S. at 312. I will read from page 329 where it is said that the court has held more than once that that which operates to deny a fair opportunity violates the due process clause of the 14th amendment and that it was apparent to the Court that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by enactment. Has not the Supreme Court held in a number of cases that Congress has no power to take any action to enforce the 14th amendment or the 15th amendment until there has been a violation of that amendment by State action?

Judge OLD. By State action, not by individual action.

Senator ERVIN. And yet, the justification that they have been trying to make for this bill, is that its purpose is to solve unfairness and inequities. There are 14 States outside of the South which have literacy tests. This bill undertakes to deprive these 14 non-Southern States of their undoubted power under section 2 of article I in the 17th amendment to prescribe literacy tests. Is that not exercising a judicial function and trying to make a determination of the facts as a basis for the right to vote?

Judge OLD. I certainly consider it so.

Senator ERVIN. And in that connection, speaking of the 14th amendment, it is like the 15th amendment, in that it only confers upon the Congress the power to enact legislation which is appropriate to enforce prohibitions against the States. In the decision in 160 U.S. at page 639, the court said that the language of the amendment does not leave the subject in doubt, that when a State has been guilty of no violation of this provision, when it has not made or enforced any law without due process of law or denied to any person within its jurisdiction the protection of law, and when, on the contrary, the laws of the State, of the legislature as construed by the judiciary recognized and protected the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

Now, doesn't this bill, insofar as it attempts to visit the supposed sins of 7 States upon 14 nonsinnyng States and deprive the other 43 States of the power to prescribe their own literacy tests, take action prohibited by the amendment, in that Congress is undertaking to act when those States have not violated the amendment?

Judge OLD. I don't see where the Congress is justified. I just don't see it. These bills, all three of them, are directed at the Southern States, they are intended to give to the executive department of the Federal Government under the color of right to descend upon the Southern States with thousands of Federal snoopers to stir up racial strife.

Senator, I think that is the secret of this proposition, I think that what they want is a whipping boy in the South so that whenever political exigencies require, they can lash out against the South and send down snoopers down South and find a lot of things that they can blow up that would make an effect upon the political situation in the great northern cities.

Senator ERVIN. Judge, in my judgment, from reading what is in the press and other sources, I am compelled much against my will, to the

conclusion that it is going to be awfully difficult to save constitutional government in the United States against the demands of those groups and organizations who find emotional enjoyment or financially profitable political advantages to make from—

Judge OLD. I think that is true, I think that is what they are doing, and I am not talking about a whole lot of mighty fine people here in the Senate and in the Congress, I am not talking about that, but I think that the general purpose of this thing, the general purpose of the organized effort behind it is to lash out against the South for political advantage.

Senator ERVIN. We went through the experience of Reconstruction—

Judge OLD. Yes, we went through Reconstruction. We are the only people in this country here whose ancestors went through military occupation, the only people. I have noted in my statement on page 8, I was referring not to the State but to the individual and I ask, now, where in the Constitution can anyone find the language to base a contention that any such plenary power has been designated to the Congress, against—

Senator CARROLL. May I interrupt? Would you yield to me for just a moment?

Judge OLD. Yes, sir.

Senator CARROLL. With all due respect to my chairman and to you, sir, who are an excellent lawyer, may I quote from Report of the U.S. Commission on Civil Rights, page 75, entitled, "The Civil Rights Act of 1957," where it says:

By the Civil Rights Act of 1957 Congress wrought a major change. It authorized the Federal Government to bring civil action for injunctive relief where discrimination denied or threatened the right to vote.

Mr. Chairman, I am going to ask for unanimous consent, this is only a page and a half, for this section of the report to be put in the record because it is an action of the Congress in this field.

(The material referred to follows:)

THE CIVIL RIGHTS ACT OF 1957

(Excerpt from 1961 report on "Voting," by the U.S. Commission on Civil Rights, pp. 75-76.)

By the Civil Rights Act of 1957, Congress wrought a major change. It authorized the Federal Government to bring civil actions for injunctive relief where discrimination denied or threatened the right to vote. This was done by adding a new subsection (c) to section 1971, giving the Attorney General power to institute civil suits when the rights declared in that section were in jeopardy. The 1957 act added another provision, subsection (b) to the statute, forbidding intimidation, threats, and coercion for the purpose of interfering with the right to vote in Federal elections. Subsection (b) is similar to the criminal provisions of the Hatch Act, except that it explicitly mentions primary, as well as general elections, and provides a basis for civil suits by both private persons and the Attorney General to seek civil relief.

Other provisions of the 1957 act gave the Federal district courts jurisdiction of such civil proceedings without a requirement that State administrative or other remedies first be exhausted; provided for contempt proceedings in the event of disobedience of court orders under the section; and, by authorizing the appointment of an additional Assistant Attorney General, led to raising the Department of Justice's Civil Rights Section to the status of a full division. The 1957 act also created this Commission.

Two years after the passage of the 1957 Civil Rights Act, when this Commission issued its first report in September of 1959, the results of the act in the field of voting seemed disappointing. The Commission noted that discriminatory denials of the vote were serious and widespread. The Civil Rights Division had instituted only three actions under the new section 1971(c), and none had yet been successful. In one case, because the registrars against whom the suit was brought had previously resigned from office, a court had held that there was no one the Federal Government could sue. In another case the district court had held the 1957 act unconstitutional, and the Supreme Court had not yet settled this question.

As a result the Commission made several recommendations for strengthening the Federal laws intended to deal with discrimination in the electoral process: that Federal law should place an affirmative duty on registrars to perform their duties; that a Federal law require that State registration and voting records be preserved for a period of 5 years and that these records be subject to public inspection—this recommendation was based on the Commission's finding that "lack of uniform provision for the preservation and public inspection of all records pertaining to registration and voting hampers and impedes investigation of alleged denials of the right to vote * * *"; and that provisions be made for the appointment of Federal officers to replace State and local registration officials when the latter were shown to be acting in a discriminatory fashion.

The Civil Rights Act of 1960 reflected in part all three of these recommendations as well as the Commission's findings which supported them.

Senator ERVIN. The statute you mention was an act with respect to practicing discrimination which was forbidden by the 15th amendment; it was not an act to let the Federal Government prescribe the qualifications of voters.

Senator CARROLL. I agree with the Senator on that but this act "authorized the Federal Government"—and I have read this before—to bring civil actions for injunctive relief where discrimination denied or threatened the right to vote. This was done by adding a new subsection (c) to section 1971, giving the Attorney General power to institute civil suits when the rights declared in that section were in jeopardy.

Now, what else has the Congress done? They created the U.S. Commission on Civil Rights. This Commission functions in every State. They have an advisory group in the State of Colorado, but there we do not have the problems that we have in these seven States and—

Judge OLD. Where do they really function outside of the South?

Senator CARROLL. As I was about to say, we do have some discrimination in my State, we are not like Caesar's wife, above suspicion, but—

Judge OLD. I am just asking you, has the Civil Rights Commission—has it ever made an effort to function anywhere except in the South? I just don't know. I would like to know it.

Senator CARROLL. The Commission gets its power—it gets it from section 2 of the 15th amendment and—

Judge OLD. Section 2 of the 15th amendment—Well, you wouldn't think that section 2 of that 15th amendment would give it the right to make its legislation applicable to the individual, would you?

Senator CARROLL. When you set up a 6th grade standard as a test for literacy, this is not, in my opinion, a qualification, but a minimal standard—

Judge OLD. I just don't subscribe to your opinion, sir, I think it is set up, the literacy test, as a qualification—

Senator CARROLL. We differ then.

The Congress, in creating the Civil Rights Commission, evaluated the evidence and made a legislative finding. Congress in its wisdom can enact statutes which affect the whole Nation, so as to equalize the rights of individual citizens under the 15th amendment, even though some States may not ask for it. The Commission was such a case; here we are presented with a similar case.

Judge OLD. Well, do you think that this power of the Federal Government is based on the 14th and 15th amendments?

Senator CARROLL. The 15th amendment, specifically in section 2.

Judge OLD. Well, section 2 of the 15th amendment gives them the right to enforce the provisions of the 15th amendment—

Senator CARROLL. By appropriate legislation.

Judge OLD (continuing). By appropriate legislation, of course, but the 15th amendment itself prohibits the United States and the States from doing this, it does not prohibit the whole body of the—

Senator CARROLL. Judge, I am afraid I cannot agree with you there, and I think that we have come to a time based upon, as I said, almost 100 years, where we have got to—

Judge OLD. Well, let us look at the language of the 15th amendment. It says that the rights of the citizens of the United States are not to be abridged by the United States or by any State—

Senator CARROLL. That is right.

Judge OLD (continuing). On account of race—

Senator CARROLL. Not to be abridged or denied by any State—

Judge OLD. "By any State," does not mean individuals, yes, it does not, it mentions the State governments and—

Senator CARROLL. But when a State sets up a literacy test which is applied in a discriminatory manner then Congress, I contend, has power there.

Judge OLD. I think—here is the provision that strikes me as being utterly without power in this bill, this S. 2750 says, and I think that the others say that no person whether acting under color of law or otherwise shall intimidate or threaten or coerce any other person for the purpose of interfering with the right of such person to vote as he may choose in any Federal election, or to do anything so as to deprive him of the right to vote in any Federal election—I don't see anything there that is like what you say—

Senator CARROLL. Well, I see your point. But—

Judge OLD. That is my point—that is exactly my point, and my point is this, that when the Federal Government undertakes to legislate and create a crime upon individuals and is basing it upon the 14th amendment or the 15th amendment which apply only to State action, then I say that it has no power to do it and I say it has no power to do it because it certainly did not get the power out of the original Constitution, no such power, and if there is any such power as that, it would have to come from the 14th amendment or the 15th amendment and the 2d section of the 15th amendment gives Congress no power over individuals, it gives the power to prevent action by a State, but what we are doing here, we are setting up something that—well, that's what it is, that is what this whole thing is designed to do—now, I don't say that there are not many, many fine and honorable people that would not do it for that purpose, but I think that that is essentially the purpose back of it—

Senator CARROLL. I don't mean to cut you short, Judge, but if the act were amended to "State," you would not be satisfied; would you?

Judge OLD. I would not be satisfied under any circumstances, but I think it would be much improved—

Senator CARROLL. And if it were to apply to the registrars, then this does not—

Judge OLD. Not registrars, it applies to individuals—

Senator CARROLL. But the point is if it were limited to registrars, you would not be satisfied then, I take it and—

Judge OLD. Well, I will tell you—and perhaps this may be due to my heritage from my childhood, from my earliest recollections, and I recall among my earliest recollections the statement of my people as to the horrors that they went through because of the excesses of the Federal Government during the Reconstruction—

Senator CARROLL. Yes.

Judge OLD. And now, sir, my mother and my father they grew up in poverty by reason of the enforcement and the horrible excesses under the 14th amendment—they had nothing to do with the Civil War—they were young.

Now, I have this to say. I believe that this country, unless it comes back to its original feeling of confidence and trust in the States, then I think we are losing the most precious system of government that has ever been devised by mankind, and I think that this does—I think that this gives the right to Federal agents and snoopers to come down to the South in great droves for the purpose of creating racial strife and to bring about great attacks through the press and all of it just for the purpose not of creating any good in the South but of creating political situations that will give them advantage in the great Harlems of the northern cities.

Senator CARROLL. We were referring to literacy tests, which only question literacy in the sense of a man signing his name. I can see no danger of an influx of carpetbaggers in Virginia.

Judge OLD. Sir, let me say this. I think that Virginia—I believe, from this example, prior to May 17, 1954—I think Virginia has had probably the finest racial relations that have ever existed on this planet and there has never been the slightest violence in Virginia and—

Senator CARROLL. Judge, I have to leave, I am sorry. I have enjoyed your testimony—

Judge OLD. Yes, sir.

Senator CARROLL. And I say to you as a man coming from the West, I have no feeling of animosity toward my friends in the South. As a matter of fact, most of us in the West vote for bettering the economic conditions in the South, and the South votes for us, so there has always been a binding tie between us.

But I feel very strongly on an issue like this.

Judge OLD. Well, Senator—

Senator CARROLL. If you would let me finish, please. Now, this type of legislation—if they had in other States the situation you have described as existing in Virginia, then there would be no need for this type of legislation.

Judge OLD. I don't believe, Senator, that this field of racial relations will ever be established on this planet—I think that history,

throughout history and in every section of the world where there are large populations of disparate races that you have got—I don't believe that the racial situation can ever be solved by law, I don't think so, and I think that in my lifetime—well, I can see many things that will be changed and I have seen many things that have changed and changed by the ordinary process of reasonable men, but nothing by law that I have ever seen changed and I think that the question—that the Senators and the Supreme Court decisions and all, they have succeeded in enforcement, they have succeeded by judicial coercion in getting about 500 Negro children in the white schools and they have succeeded in losing schools for 1,700 Negro children in the County of Prince Edward, and there are many, many—the issue is there, but it will never be solved by law as long as mankind exists, and I believe this, I believe that there must be a separation of the races, and that is the only salvation to the racial situation and I think that what is happening here in the city of Washington certainly brings that out, they integrated all of the schools and that meant that the white people that are most needed by the city have moved out——

Senator CARROLL. Well, it may not be settled by law but——

Judge OLD. It cannot be and never will.

Senator CARROLL. But can it not be settled by the intelligent and reasonable application of the law over a long period of time. As you know, I come from Denver. I can remember in Denver 25 years ago when it was very difficult for a colored man to sit on the main floor of a theater. There was other discrimination. But today in my city, this is all adjusted.

Judge OLD. Senator, what is the proportion of Negro population to the total there?

Senator CARROLL. Well, that is a point I was about to make, that your problems are more acute. However, we have a substantial group of American Negroes and——

Judge OLD. And I think you will have more.

Senator CARROLL. They are coming in.

Judge OLD. Yes, they are coming in.

Senator CARROLL. They are coming from the Deep South and you may be surprised how easily they are moving into the life of the community. I do not like to make comparisons which would be unfair in light of some of the problems confronting the Deep South—but you in Virginia are not having any grave problems are you, down there?

Judge OLD. We are having great problems, we are having great problems, there is a good deal of trouble in Virginia and the only reason that we have not had any greater problems is because our people are of a nature where they do not bring forth any violence and——

Senator CARROLL. Well, I didn't think that you had any problems.

Judge OLD. We do have problems but—well, I think that our colored people are so happy with their schools and there is certainly no lack of schools.

Senator CARROLL. Yes, I know. I mean the segregation problem.

Judge OLD. We have problems with that and the problems will continue, day by day, year by year, and these attacks upon the South by the Federal Government, that is bound to create trouble. We do not consider that the Federal Government is on a moral plane superior to the government of the Commonwealth of Virginia.

Senator CARROLL. May I say this, Mr. Chairman, off the record?

Senator ERVIN. Off the record.

(Discussion off the record.)

Senator ERVIN. You may continue with your statement, Judge.

Judge OLD. I have finished, sir. And may I say that this question here about this section in the Senate bill 2750 which I have read—that is our trouble, as I see it, it applies to the ordinary rank and file of people, not to the States at all.

Senator ERVIN. Judge, you are certainly right and even if it is not true, these words that apply to the States go far beyond that because it uses the words “no person whether under color of law or otherwise.”

Judge OLD. Yes.

Senator ERVIN. Let me read that section,

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose in any Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election.

Now, as a matter of fact, that goes far beyond section 2 of the 15th amendment and it attempts to apply the 15th amendment to individuals?

Judge OLD. That is exactly what it does.

Senator ERVIN. And it is clearly unconstitutional under a number of decisions of the Supreme Court of the United States and it is a violation of the actual language of the 15th amendment—

Judge OLD. It is a violation of that actual language of the 15th amendment.

Senator ERVIN. Judge, let me read on here:

“Deprivation of the right to vote” shall include but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

“Federal election” means any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions.

SEC. 3. If any part or provision of this Act is held invalid, all other parts or provisions shall remain in effect. If a part or provision of this Act is held invalid in one or more of its applications, the part or provision shall remain in effect in all other applications.

I have read to you the whole operative part of this bill.

Now, I ask you, even if it is amended to exclude application to individuals and restrict it to State action, I ask you if it would not be unconstitutional on the additional ground that the second section of the 14th amendment empowered Congress to enact legislation to enforce the provisions of the first section of the 14th amendment, and the only thing that the first section of the 14th amendment—

Judge OLD. Fourteenth amendment?

Senator ERVIN. I mean the 15th.

Judge OLD. Yes.

Senator ERVIN (continuing). What the 15th amendment does, is deny the United States and the States the power to discriminate against a person on the basis of his race, color or previous condition of servitude.

Judge OLD. Yes.

Senator ERVIN. So I will ask you if this bill is not unconstitutional in this way, even if it were restricted to State action, does not the second section of article I of the Constitution vest in the States, in effect, the power to prescribe the qualifications for voters in congressional elections?

Judge OLD. I don't see how anybody could escape that conclusion.

Senator ERVIN. And for this bill to undertake to set up standards, even if it were restricted to the States, on the basis of the 15th amendment, would be an effort on the part of Congress, not to prevent discrimination on the basis of race, color and previous condition of servitude, but to legislate as to the qualifications of voters in violation of section 2, article I?

Judge OLD. I think it does, I think it violates that, and that same section, article I, section 2, already operates in the 17th amendment—

Senator ERVIN. Exactly.

Judge OLD. And that language is involved in the 14th amendment and the 15th amendment.

Senator ERVIN. And now, Judge, I would like to read from the decision in the 1883 *Civil Rights* cases dealing with the 14th amendment. It says that the 14th amendment is prohibitory on the States only, and the legislation authorized to be adopted by Congress is not direct legislation on the matters respecting which the States are prohibited from making or enforcing certain laws or to do certain acts, but it is corrective legislation such as may be necessary or proper to counteract or to redress the effects of such laws or actions. I will ask you if the Supreme Court has not held in a number of cases that the only legislation which Congress can pass appropriate to enforcing prohibited State acts is legislation which compels the State to refrain from the prohibited action, and that it does not have the right to enter into the field of State legislation and to do what the States are supposed to do?

Judge OLD. I think that is true and I do not think they have any right whatsoever over the individuals within the State, I do not think so, not under the 14th amendment or the 15th amendment.

Senator ERVIN. There is no question about that in my mind.

Judge OLD. Even as bad as the 14th and 15th amendments are, and even taking into consideration the fact that the 14th amendment was not put in there by the consent of the Government, it still does not—if we could rely on the 14th amendment as it was written, as it was intended, then it would not be so bad but, as I see it now, it seems to me that the judicial department of the United States and the executive department of the United States—Congress has done very little in it, and there isn't much of a—but the Federal courts and the Federal executive department have undertaken, it seems to me that they are bent and determined to nullify the rest of the Constitution by reason of the 14th amendment, they have nullified—when was the last time

that you heard anybody refer to the 10th amendment? I mean in the executive and the judicial branches of our Government?

Senator ERVIN. Well, it seems that they do not recognize its existence any more; they put on blinders and pass by it.

Judge OLD. If I had read nothing in the world but the opinions of the Supreme Court and the directives of the executive branch of the Government and did not have the Constitution before me and the amendments thereto, I would reach the conclusion that the 10th amendment had been deleted from the Constitution or was no longer a part of it.

Now, I cannot conceive of how either the judicial department or the executive department after having sworn to uphold the Constitution of the United States could act with any degree of constitutionality and avoid recourse to the 10th amendment in reaching these radical and revolutionary decisions and actions.

Senator ERVIN. Judge, I would like to read to you from this decision, which hits this whole argument, I think, right square in its constitutional solar plexis; this is *U.S. v. Reese*, which is reported in—well, I have it in the Law Edition—23 L. Ed., page 563. It is a rather long quotation, so I ask you to listen very carefully.

Judge OLD. Yes, sir.

Senator ERVIN. It says that the 15th amendment does not confer the right to vote upon anyone—it prevents the States of the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude. [Reading:]

Before its adoption, this could be done; it was as much within the power of the States to exclude citizens of the United States from voting on account of race as it was on account of age, property, or education. Now, it is not. If the citizens of one State have certain qualifications and are permitted by law to vote, those of another having the same qualifications must be.

Previous to the amendment, there was no constitutional guarantee against discrimination, but now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protective power of Congress, exemption from discrimination in the exercise of the franchise on account of race, color, or previous condition of servitude. That is under express provisions of the second section of the amendment, Congress may enforce it by appropriate legislation. Now, this leads to the inquiry whether the act now in consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting in State elections rests upon this amendment. Section 4 of the Constitution in respect to the election of Congressmen and Senators is not now under consideration.

It has not been contended that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at a State election; it is only when the refusal at such an election is because of race, color, or previous servitude, that Congress can interfere and provide for it.

Now, is not one of the constitutional vices in these bills the fact that they are undertaking to interfere not on the basis of race, color, or previous condition of servitude but on the basis of what may be called education or literacy? This decision says that before the 15th amendment was adopted, the State had a right to prescribe the qualifications so as to exclude citizens from voting on account of race, on account of age, on account of property, on account of education, naming four things. It says that the only thing that the 15th amendment authorized Congress to do in the way of legislation was to adopt

legislation which would prevent the States from denying a man the right to vote on account of race, color, previous condition of servitude. So does it not leave the right of the States to prescribe an educational test of literacy wholly unaffected?

Judge OLD. I think that is unquestionably true.

Senator ERVIN. And therefore these bill are unconstitutional on these grounds; in addition to the fact that they are not appropriate legislation to enforce the 15th amendment and to the fact that they apply to action on the part of individuals, they are an attempt on the part of the Federal Government to usurp and exercise the power to prescribe voter qualifications vested in the States by section 2 of article I?

Judge OLD. I think that is unquestionably true, Senator, I think that the bill, that all these three bills seeking these standards in Federal elections or State elections, they are equally unconstitutional, I don't think there is any question as to the unconstitutional aspects in any of these bills as I read them.

Senator ERVIN. And I agree with you perfectly. That is because the States have practically unlimited power to prescribe qualifications?

Judge OLD. That is right.

Senator ERVIN. The only limitations put on the States is the limitation of the 14th amendment and of the 15th amendment and the 19th amendment.

Judge OLD. Wouldn't the Congress have the equal right to say that no State shall deny any person who has reached 18 years of age the right to vote?

Senator ERVIN. Exactly.

Judge OLD. I mean, if they can—and now, of course, the great Northern States—well, the great State of Georgia has made the election qualifications, they have set it at 18 rather than 21—but suppose Congress should undertake to do that under some specious reason, to try to bring it under the race situation, wouldn't that be unconstitutional? I would think so.

Senator ERVIN. And on the theory of this bill, under which its supporters think that it can be justified, they could say the same thing about crime. In other words, do not the records show a larger percentage of nonwhite violations of the law than white?

Judge OLD. You mean committed between that age and—

Senator ERVIN. I mean, doesn't the record show that there is a considerably higher percentage of nonwhites who commit felonies than whites? In saying "violations" I was referring to felonies.

Judge OLD. Oh, yes, sure it does.

Senator ERVIN. And so, could there not be a preamble in a bill that—this disqualification for committing a felony is really based on race and therefore we will just abolish this qualification that the State made on the noncommission of felonies?

Judge OLD. I think that is unquestionable.

Senator ERVIN. And the same thing would be true of any other qualification?

Judge OLD. Well, if they can say this, what they have attempted to say—and they are directing it at us, they are not directing it at anybody else, if they can say that, then I think that they will develop a tremendous animosity toward the colored people and say that because

a great majority of crimes and felonies are committed by colored people, that all colored people should be denied the right to vote, it would be the same thing as what they are doing now.

I was talking to a colored friend of mine, and I have a great many colored friends, and I told him this, I said that the time is coming, maybe 10 years or maybe 15 years from now, but the time is coming when the colored people moving into the North will find that the greater support for the colored people is going to come from the South, it is going to be some 10 or 15 years, but I have not seen any indication whatsoever that the people of the North want to be integrated with the colored people any more than the people of the South. I have not seen that, on the other hand, they are all moving out and going to the most terrible expense and everything just to get away from them and, Senator, did you hear the recent definition of an integrated school?

Senator ERVIN. You had better give it off the record.

(Discussion off the record.)

Senator ERVIN. You may proceed, Judge.

Judge OLD. I was finished, sir.

Senator ERVIN. You are finished. Well, just to sort of summarize what I think you and I agree on:

That with respect to the 15th amendment, well, I will read to you what was stated by an eminent justice. This is the opinion of the Circuit Court of Appeals of the Sixth Circuit, reported in 121 Reporter at page 250, and this opinion was written by a circuit judge who later became a member of the Supreme Court of the United States and who, in my judgment, is one of the most capable lawyers who ever sat on the bench, and he said this about the 15th amendment:

In view of the evidence or rather the opinions expressed by some citizens as to how far the 15th amendment ought to be stretched, the 15th amendment is a limitation upon the powers of the State, and they are otherwise unlimited in their rights to prescribe the qualifications of voters in their own elections, and the powers of the Congress are necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still determined by the laws of the State, and the power of the State to prescribe the qualifications is limited in only one particular: the right of the voter not to be discriminated against at such elections on account of race or color. That is the only restriction. There are certain very obvious limitations upon the power of Congress to legislate enforcement. First, it must be addressed to State action; and second, it must be limited to dealing with discrimination on account of race, color, or condition.

I think that is about a clear a statement of what is appropriate legislation on this that I have ever seen.

Judge OLD. I think so, yes.

Senator ERVIN. Now, Judge, as I see it, you have pointed out in the clearest fashion, I think, of any person who has undertaken to analyze this bill, that this is not appropriate legislation under the first of these two conditions laid down by Judge Burton, in that it is not confined to State action, but on the contrary, it applies to actions of individuals and so it is unconstitutional under the 15th amendment on the first ground. That is demonstrated by reading section 2 and 3 of the so-called administration bill, which is S. 2750. That bill fails to comply with the second condition set out by Judge Burton in his opinion, in that it is not restricted to an attempt to prevent discrimination on

account of race, color, or previous conditions of servitude, but on the contrary, is an attempt to set up a Federal standard over the States. So the bill is unconstitutional. I think you agree it is unconstitutional in the light of section 2 of article I of the Constitution in that it attempts to enter a field reserved by the Constitution itself for State legislation; namely, the right to prescribe the qualifications for the voters in State elections and also it is unconstitutional in the field reserved to the States under article I of the 17th amendment, is it not?

Judge OLD. I think so and I know of nothing in my judicial training or in my legal training where I can possibly see how these bills can be constitutional.

Senator ERVIN. Now, this opinion says that on a third ground it would be invalid. It cannot rest on anything except the 14th and 15th amendments and these would invalidate the bill, would they not?

Judge OLD. I think so. Senator Ervin, have they abandoned any idea of article I, section 4, as a provision which would grant some constitutional efficacy to this mess?

Senator ERVIN. Well, Dean Griswold, to all intents and purposes, has said that he based the constitutionality of these bills on section 4, article I, and although he said it may rest somewhat insecurely on the 13th amendment, he also said that he would think that foundation would be rather thin.

Judge OLD. I would, too, I don't see how he could possibly—

Senator ERVIN. The 13th amendment outlaws slavery and involuntary servitude except as a prescribed punishment, and only by the very wildest flight of the imagination could you conjure up any possible relationship between slavery and involuntary servitude and the voting franchise.

Judge OLD. Well, I don't see how—I could not do it, I would not want to do it—but I couldn't do it if I wanted to.

I don't believe that a whole lot of people have ever gotten over the idea or have ever learned that those of us who live in Virginia now never had anything to do with slavery, nobody living in Virginia had anything to do with slavery, either the importation into Virginia or the exercise of slavery—and it is not a very pretty picture, either from our standpoint or the standpoint of the slave merchants in New England that brought them in here, and as far as I know nobody in Virginia or the great Northern States went to Africa and took these colored people in slavery—if they have, I have never heard of it.

Senator ERVIN. No.

Judge OLD. I have never heard of any opposition to slavery from New England until 1808 when they lost their power to make money out of the slaves, they did not have any abolitionists until that time, and then they began to jump on us on account of the slaves that they sold to us.

Senator ERVIN. Well, Judge, on the Senate floor, a colleague of mine said—let this be off the record.

(Discussion off the record.)

Senator ERVIN. Judge, these bills, would you agree, seek to strike at the literacy tests of the States on the ground, among others, that they are alleged to be arbitrary and unreasonable. I would like to call your attention to the case of *Pope v. Williams* (reported at 193 U.S. 161).

Now, that is a case in the State of Maryland which had a law that said that any person who moved into Maryland from outside and who wanted to register to vote at the next registration period, would have to go to the county clerk and give notice to the county clerk that he intended to become a resident and voter in the State of Maryland. That Pope failed to do. He had moved into Maryland from outside the State and failed to give this notice to the county clerk. But when the time came to next register, he went up and attempted to register and he was denied the right to register and he made an attack upon the Maryland laws on the ground of their being unreasonable.

The Supreme Court, in their opinion, said that the States have the power to prescribe the terms on which citizens of the United States residing in the State can vote, subject to not waiving a man's right to vote because of race, color, or previous condition of servitude. When they got to this question or the contention of Pope that this was an unreasonable statute, even if it was within the jurisdiction of the legislation of Maryland, the Supreme Court gave short shrift to that position. It said:

That the conditions set, and prescribed by the State might be regarded by others as reasonable or unreasonable, but that determination is not a Federal one, and Pope's contentions were overruled.

Now, isn't that a complete answer to the contention that Congress in some mysterious way, not in the Constitution, has that power to declare a qualification prescribed by a State as arbitrary and unreasonable and, therefore, say "we are going to throw it on the scrap heap"?

Judge OLD. And going to do it by reason of section 2 of the 15th amendment.

Senator ERVIN. Yes.

Judge OLD. I think that the Supreme Court was entirely right there, and I think that has a very distinct relationship to what we have got here.

Now, Senator, I was very much surprised to hear Dean Griswold say here this morning, I mean this afternoon, that he did not know how many people had been denied the right to vote, and he didn't say whether it was 5 or 1,000 or 10,000 or what. The evidence that he got is that there may be some people who had been deprived of it.

The question here is that you do not have any perfect administration of laws, but there has not been any case written out of any widespread denials.

Now, to say that a great many, a whole lot of colored people in some areas resided there and to say that nobody voted—but they don't say whether they are not voting because they didn't ask to register or to vote, or anything—

Senator ERVIN. That is the reason that I wanted to show Dean Griswold just how many, how much reliance could be placed in emphasis upon figures and that is the reason why I asked what percentage of the students enrolled in Harvard Law School were nonwhite and I was conscious then of the fact that the number of nonwhites in the population of the country composed 10 percent. Dean Griswold said that the percentage enrolled at Harvard Law School of nonwhites was substantially less than 3 percent.

Now, a person that wanted to draw an inference from figures alone, he could say that since the nonwhites numbered 10 percent over the whole country and since the Harvard Law School, which is a national law school, and which draws students from sections all over the country, since it has less than 3 percent, and I believe that the Dean said substantially less than 3 percent, we could draw the conclusion that Harvard Law School was discriminating against nonwhites on the basis of color. Now, don't you think that such an inference would be very unfair?

Judge OLD. Very unfair.

Senator ERVIN. Off the record.

(Discussion off the record.)

Senator ERVIN. One more question on the so-called administration bill. It has a section which would not only provide that no educational or literacy test could be prescribed and that the States could not require any more than a sixth-grade education, but also that a person might complete the sixth grade in Puerto Rico and that would give him the right to register as far as the literacy test is concerned without any examination by the State authority to consider whether he can speak or read a word of English. This is despite the fact that he cannot read it, and he cannot write any English, and despite the fact that the literacy tests of every American State which has a literacy test, except Hawaii, say that he must demonstrate his literacy by an ability to read and write or speak English—and in Hawaii the ability also to read or write or speak English or Hawaiian. What power has Congress to say to the 50 States of this Union that they cannot adopt a literacy test which will bar a person from Puerto Rico who cannot speak English or read or write English, and that the literacy tests of the States that have tests are null and void insofar as they attempt to require such a person to speak English rather than Spanish?

Judge OLD. I wouldn't think they have any earthly right to do it.

Senator ERVIN. That seems to me rather interesting in view of the fact that the proponents of these bills take the position that the States do not have the right to exclude Puerto Ricans with a sixth grade education.

Judge OLD. That is right.

Senator ERVIN. Does anybody have any questions?

(No response.)

Senator ERVIN. Judge, I want to thank you very much for coming before the subcommittee.

Judge OLD. Senator, it is always a pleasure to be up here with you, always a pleasure.

(Thereupon, at 4:45 p.m., the subcommittee adjourned subject to call of the Chair.)

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

THURSDAY, APRIL 5, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 3 p.m., in room 1318, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senator Ervin.

Also present: William A. Creech, chief counsel and staff director; and Bernard Waters, of minority counsel.

Senator ERVIN. The subcommittee will come to order.

Call the first witness.

Mr. CREECH. Mr. Chairman, the first witness is Senator Stennis.

Senator ERVIN. Senator Stennis.

Senator STENNIS. Thank you, sir.

STATEMENT OF HON. JOHN STENNIS, U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator STENNIS. Mr. Chairman, I appreciate the opportunity to appear before the subcommittee this morning in opposition to S. 480, S. 2750, and S. 2979, the so-called antiliteracy test bills now pending before the subcommittee. I especially appreciate the chance to appear here this afternoon. Because of other matters I could not be here earlier.

The provisions of the three bills are similar but since S. 2750 is the administration bill, presented by the majority leader (Mr. Mansfield) and the minority leader (Mr. Dirksen), I will confine my statement to that bill.

I do not believe that under any possible interpretation the Constitution gives the Congress the power to enact a statute on this subject. It seems to me that section 2 of article I of the Constitution clearly and explicitly gives this sole power to the States. Section 2, article I, of the Constitution provides as follows:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Is it not clear that only the States themselves can fix the qualifications of those who will vote for the members of the State legislatures? This has been the law for 173 years, and only when elections approach

and the votes of minority groups are sought is the principle challenged at all.

In view of the plain provisions of the Constitution, citation of authority for this proposition should not be necessary. However, there is a wealth of authority on this point. I will not burden the subcommittee by citing even a small fraction of the authorities on this point, but I will quote briefly from 29 C.J.S., Elections, section 5, page 25, as follows:

The Constitution of the United States gives Congress no power to prescribe the qualifications of electors in the States.

In support of this statement, C.J.S. cites the case of *Breedlove v. Suttles*, 58 S. Ct. 205, U.S. 277, 82 L. Ed. 252.

As I started to read the bill, the first thing I noticed is that it begins with "recitals" or "findings" by the Congress. After I came to the Senate, it did not take me long to learn to beware of legislation with such prefaces. It usually means that the person who drafted the bill had serious doubts of his own regarding the constitutionality of the bill. These are self-serving declarations seeking to bolster the bill at the outset with facts and constitutional support which really does not exist.

The first "finding" is that it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials. In my judgment, the key word here is the word "qualified." I have no quarrel with that statement, but I must insist that the Constitution reserves to the States the power to determine who is qualified.

The next so-called finding is that the right to vote in Federal elections should be maintained free from discrimination and other corrupt influence. Few can find fault with what is on the surface of that statement.

The third finding is where the authors of this bill start wading into deep water and soon they are in over their heads. This finding piously states "that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote." Proponents of this legislation have searched far and wide and have been successful in bringing to light a handful of individual incidents over the entire Nation where election officials have not complied with existing law. There have been several of these cases in my own State and there have been some in other States. At the same time, there has been no showing that these problems cannot be corrected under existing law, and many of them have been corrected, nor that this legislation, if enacted, will correct them. The key words to this finding are contained in the phrase, "existing statutes are inadequate" to assure that all "qualified persons" shall enjoy the right to vote.

At this time, we have at least five separate and distinct Federal statutes protecting the right of qualified individuals to register and vote. At this time, I refer only to Federal laws on the subject. Of course, each State has laws of its own protecting these rights.

Under the provisions of section 1983 of title 42, United States Code, any citizen of the United States deprived of any right, privilege or immunity secured to him by the Constitution and laws may institute a suit for damages against the person who deprives him of that right, under color of any statute or custom of any State. The Supreme Court of the United States has held that under this statute, any qualified person denied the right to vote by any State election officials has the right to sue for damages. *Lane v. Wilson*, 307 U.S. 268.

Further, any person denied the right to vote by reason of his race, color or previous condition of servitude may sue for damages actually suffered or may seek an injunction to prevent a threatened injury. Under this statute, he may pursue either course. Of course, these are civil remedies running to the person involved.

In addition, section 241, title 18, of the United States Code prohibits conspiracies against the rights of citizens and provides that if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution, such persons shall be fined not more than \$5,000 or imprisoned not more than 10 years.

In a number of cases, the Supreme Court has held that the right of qualified persons to vote at an election for Senators or representatives is a right secured by the Constitution and laws and is within the conspiracy section. And there are cases currently holding. *Guinn v. United States*, 238 U.S. 347; *Ex parte Yarbrough*, 110 U.S. 651. I will discuss these cases later in this presentation.

Further, section 242 of title 18, United States Code, provides a penalty of \$1,000 or imprisonment for not more than 1 year, or both, for any person who, under color of law, deprives any person of a right, privilege or immunity secured or protected by the Constitution or laws of the United States. The right of a qualified person to vote in an election for Senators or Representatives in Congress is a right secured or protected by the Constitution, according to a number of decisions of the Supreme Court. Any election official who wrongfully deprives a qualified voter of that right is guilty of a crime. *United States v. Classic*, 313 U.S. 299, so holds. This case will also be discussed further.

In 1957, Congress enacted additional civil statutes to secure the right to vote to every citizen entitled thereto and providing that no person shall be denied the right to vote in an election in any State on account of his race, color or previous condition of servitude. Another section provides that no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote for any candidate for President, Vice President, Senator or Representative.

Under the Civil Rights Act of 1957, appearing as title 42, section 1971, United States Code, whenever any person has reasonable ground to believe that another is about to violate either of these sections, the Attorney General may proceed in the name of the United States, at the taxpayers' expense, in a civil action or other proceeding for preventive relief and may seek a permanent or temporary injunction. The courts are given the power to cite violations for contempt.

Under the Civil Rights Act of 1960, appearing as Public Law 86-449, title 6, where a district court in a proceeding under title 42,

section 1971, finds that a person has been deprived of a right or privilege secured to him under the Constitution and laws (the right to vote) the court shall, upon request of the Attorney General after proper notice, proceed to determine whether such deprivation was pursuant to a pattern or practice. If the court finds that a pattern or practice existed, then any person of such race or color living within the affected area shall, for 1 year and thereafter until the court subsequently finds that the pattern or practice has ceased, be entitled to an order declaring him qualified to vote. He only has to show that he is qualified under State law and after the finding of a pattern or practice he was deprived of the opportunity to register to vote under color of law. And this is a permanent registration. Further, the court has the authority, after such finding, to appoint voting referees to receive applications, take evidence, determine qualifications, and otherwise supplant the duly constituted election officials.

I have not attempted to discuss these five separate Federal laws in detail. However, I think it safe to say that instead of the finding that existing statutes are inadequate, a more accurate finding would be that this is one subject upon which there are ample laws. A more correct conclusion would be that the laws are more than adequate. In fact, they are so adequate and cover so many different possibilities and situations that I can well imagine the Justice Department has a real problem in deciding which laws to use. It seems that there are at least two laws to cover every conceivable situation. And yet, in spite of the hue and cry for additional legislation to protect the right to vote, which we are told is a civil right being violated on every street corner in the land, there seems to be an extreme shortage of clients for the Justice Department to represent.

Mr. Chairman, there has been a lot of loose talk about minority rights, civil rights, liberties and similar so-called rights. Frankly, I think the people of the United States and the people of the individual States have some rights which are being violated and which should be protected. The first and foremost right I think of immediately is the right that each individual citizen has that the Constitution and laws will be faithfully executed and followed.

Frankly, we have constitutional provisions being violated every day, not only in the field of States sovereignty and local self-government, but in other fields. If our system of government is to survive, we must restore faith, confidence, and respect in our Constitution. I have always felt that this was the most outstanding document ever devised by man, and it has met the test of time for 173 years. At one time, early in the history of our Government, the Constitution was studied and read by every citizen, along with the Holy Bible, and it was respected and revered.

Mr. Chairman, just last Sunday I had the pleasure of going down to Stratford, Va., and I stood in the room there where two signers of the Declaration of Independence were born. And I went on down a few miles further to the ancestral home of George Washington, thinking during that day about the birth of this great country and its Constitution.

The next finding recited in the bill is that persons who have completed six primary grades in a public school or accredited private school cannot reasonably be denied the franchise on grounds of illit-

eracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship.

I feel that we have an excellent school system in Mississippi and throughout the United States. In the first six grades students obtain the basic fundamentals, laying the groundwork for additional education as they grow older. Ordinarily, a sixth grader has studied the "three R's," reading, writing, and arithmetic. In addition, he has usually had courses in English, spelling, history, geography, health, American history, and possibly others. He has a fair education, which, when tempered and supplemented by years of experience in the natural growing up process, would equip him to become generally familiar with the duties and responsibilities of citizenship when he is 21. This is certainly true in most cases, but we all know there are exceptions to this general rule. As a hard and fast rule to be applied in every case, I frankly think it is a bad precedent. However, the real issue is not the factual appraisal of the worth of a sixth grade education. The issue is: Does the Congress have the authority to determine that this sixth grade education qualifies one to become a voter? My answer is a resounding "No." Only our States, in their wisdom, can make this determination.

And the answer would be the same if the sponsors of this legislation proposed a high school or even a college education instead of a sixth grade education. There is not one speck of constitutional authority for such legislation. That is the point I emphasize—constitutional authority. The level of education for these purposes is immaterial. It is up to each State to decide. This constitutional power was reserved to the States and has not been withdrawn in the only way it could be; that is, by constitutional amendment. A report of the Civil Rights Commission cannot do it. The President cannot do it. The Supreme Court cannot do it. And the Congress cannot do so. It can only propose amendments. Sponsors of this bill do not seek to have the Congress propose an amendment to the Constitution. No—they just propose that Congress ignore and in this case actually trample the Constitution—they propose that we close both eyes, forget the Constitution, and follow blindly after the social reformers.

Mr. Chairman, such policies and procedures did not make this country great. And I predict that the quickest way to our downfall is through the continued casting aside of our Constitution, ignoring its clear provisions, as seems to be so popular today in some quarters.

With one mighty stroke, the authors of this bill would have the Congress, by simple legislation, announce to the world that any person with a sixth grade education automatically possesses a reasonable understanding of the duties and responsibilities of citizenship. Not only would this strike down all State legislation on literacy in all the States, it would federalize a sensitive State power expressly reserved by the Constitution to the States, in plain, clear, and unmistakable language.

My State is not involved in the next "finding" contained in the bill since we do not have large numbers of citizens who speak the Spanish language. For that reason I will not attempt to comment on this paragraph of the bill at this time. I think all voters in all States would be able to speak the English language.

But now we come to the heart of the matter and the provisions of the bill which the legislative draftsman inserted, therein seeking to make out his case, when none existed. We have here his allegations of a constitutional foundation for this legislation—the sources within the Constitution itself which it is said authorize the bill.

Since this is the heart of the matter, I quote this paragraph of the bill:

(f) Under article I, section 4 of the Constitution; section 5 of the 14th amendment, and section 2 of the 15th amendment; and its power to protect the integrity of the Federal electoral process, Congress has the duty to provide against the abuses which presently exist.

Sponsors of the bill thus adopt three separate provisions of the Constitution as the foundation upon which this legislation must rest. I do not think that any word, clause or sentence in either of these provisions authorizes this bill.

First, let me quote section 4 of article I of the Constitution:

The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators.

How can it be said that this bill refers to the time, place or manner of holding an election?

This language is clear and concise. Its meaning cannot be misunderstood. Any person able to read and write, with a reasonable understanding of the English language, must conclude that this section does not grant any power to the Congress to determine the qualifications of electors. The power extends only to the power to regulate the time, places and manner of elections. The only word even remotely open to interpretation in this sentence is the word "manner." Even that word, however, read in conformity with other provisions of the section and the Constitution can only mean that "manner" relates to the procedure for holding the election.

Perhaps the most accurate interpretation of this provision can be made by considering the opinions of those who participated in the writing and discussions of the Constitution. We are fortunate to have available the Federalist Papers, which undertook, to explain and defend the provisions of the Constitution to the people who were considering its ratification. These contemporary discussions are more accurate than appraisals and opinions made today in this modern world by those who could not possibly be familiar with the thinking and the times during that period following the Revolutionary War and the failure of the Articles of Confederation.

In the Federalist Papers, No. 52, we find this most enlightening statement by James Madison:

The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the State government, that branch of the Federal Government, which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory as to some of the States, as it would have been difficult

to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States; because, being fixed by the State constitutions, it is not alterable by the State government, and it cannot be feared that the people of the States will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the Federal Constitution.

Mr. Chairman, I address one that is unusually learned in our constitutional law and history. The statement here by James Madison makes so clear as to be almost simple, the fine, delicate balance that this clause of the Constitution carries, and exactly what the founders meant. And as a practical matter it is still just as sound now as it was in the days of Madison.

Even Alexander Hamilton, never considered an advocate of States rights, but one of the authorities on constitutional interpretation, before the ratification of the Constitution wrote in Federalist No. 60, that the authority of the National Government:

*** would be expressly restricted to the times, the places, the manner of elections—

national elections—

The qualifications of the persons who may choose, or be chosen, as has been remarked on other occasions, are defined and fixed in the Constitution, and are unalterable by the (National) Legislature.

Again, Mr. Chairman, the very finest in simple language.

The sponsors of this legislation would ignore James Madison, Alexander Hamilton and the other Founding Fathers who labored so diligently and so long to bring forth the Constitution. They would sweep their statements aside and enact legislation clearly in conflict with the power granted to the Federal Government.

It is certainly clear that there was no misunderstanding of the intention of the States when they ratified the Constitution. In fact, 7 of the 13 States, a clear majority, adopted resolutions against the interference of the National Government even in regard to the times, places, and manner of holding elections, unless the States themselves had not acted. These States were New York, Pennsylvania, South Carolina, North Carolina, Virginia, and Massachusetts.

Obviously, there was a very jealous regard for the rights of the States in the matter of suffrage.

On this very question, in *Newberry v. United States*, 256 U.S. 232 (1920), the Supreme Court commented:

The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the latitude we are now asked to sanction, it would not have been ratified. (See "Story on the Constitution," secs. 814 et seq.)

It would have been folly indeed to present a bill similar to S. 2750 in the First Congress. The passage of time has not changed the constitutional power of Congress in this field.

Senator ERVIN. If I may be permitted to interrupt you as you leave, on the question of section 4, article I, some days ago Dean Griswold of the Harvard Law School appeared before the subcommittee as a spokesman for the Civil Rights Commission. And to all practical intents and purposes Dean Griswold admitted that section 4 of article I did not afford a sufficient constitutional foundation to support these bills.

Senator STENNIS. Well, I thank the Chair. I did not have a chance to attend that hearing, but I read the press reports of the testimony, and also the questions propounded by the Chair.

Secondly, we are told by these findings that Congress has the authority to pass this bill under section 5 of the 14th amendment. Among other provisions the 14th amendment guarantees to all citizens the equal protection of the laws and prohibits a State from denying to any person the equal protection of the laws. Section 5 provides as follows:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The 14th amendment was never intended to include the matter of suffrage at all. That subject was left to be covered by the 15th amendment, which mentions voting specifically. But if any authority is needed on this point, the Supreme Court answered the question emphatically in 1874, only 6 years after the adoption of the 14th amendment. In *Minor v. Happersett*, 88 U.S. 162, the Supreme Court held that no new voters were made by the 14th amendment, and that the amendment did not add to the privileges and immunities of a citizen but only furnished an additional guarantee for the protection of such as he already had. In the course of its opinion the Court said:

Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

Let me emphasize that any effect of the 14th amendment operates "through States and the State laws" in the words of the Court.

In other cases, the Court has reaffirmed this principle, *Pope v. Williams*, 193 U.S. 621 (1904); *Breedlove v. Suttles*, 302 U.S. 277 (1937).

Thirdly, it is said that Congress has the constitutional authority to enact S. 2750 under the terms of section 2 of the 15th amendment. That amendment, of course, provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2 provides as follows:

The Congress shall have power to enforce this article by appropriate legislation.

This amendment, then, prohibits the States and the United States from denying the right of citizens to vote. It does not give the vote to anyone. Only the States can take that action. The adoption of this amendment did not in any way alter the provisions of article I of the Constitution, which clearly reserved to the States the power to fix the qualifications of voters, and determine who might meet those qualifications.

In 1876, the Supreme Court decided in *Reese v. United States*, 92 U.S. 214, as follows:

The 15th amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude * * *.

The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified

elector at such elections is because of his race, color or previous condition of servitude.

Other cases decided by the Supreme Court through the years have upheld this principle. In *Pope v. Williams*, 193 U.S. 621 (1904), the Court reaffirmed its earlier holding that the States retained control over suffrage, even after the adoption of the 15th amendment. In that case, the Court said:

Since the 15th amendment the whole control over suffrage and the power to regulate its exercise is still left with and retained by the several States, with the single restriction that they must not deny or abridge it on account of race, color or previous condition of servitude.

Later, in the same opinion, the Court used this language:

* * * the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a Member of Congress is not derived exclusively from the State law (see Federal Constitution, art. I, sec. 2). But the elector must be one entitled to vote under the State statute. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper.

In a later case, *Guinn v. United States*, 238 U.S. 347 (1915), the question involved was the application of literacy tests and whether the use of such tests conflicted with the 15th amendment, a question very similar indeed to that being discussed today in relationship to this legislation. In that case, the Court said that the establishment of the literacy test was a valid exercise by the State of a lawful power vested in it and was not subject to supervision. In discussing the 15th amendment, the Court used this language.

Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the diversion of State and National authority under the Constitution and the organization of both governments rest would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment recognizes the possession of the general power by the State, since the amendment seeks to regulate its exercise as to the particular subject with which it deals.

It is true also that the amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the amendment deals and to the extent that that obedience to its command is necessary. Thus, the authority over suffrage which the States possess and the limitation which the amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both.

This holding has been reaffirmed recently in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, decided in 1959, as I recall, in the State of North Carolina.

What can be more clear? Under the plain words of the Constitution, under numerous interpretations of the Constitution by the Supreme Court, even construing the provisions relied upon by the sponsors of this bill, the Congress does not have one ounce of authority to proceed in this field.

If further proof is necessary as to the correctness of this position, the question should be settled once and for all by pointing out that even after the adoption of the 14th and 15th amendments, another amendment was adopted, the 17th amendment. This amendment provided for the direct election of U.S. Senators by the people. The last sentence of clause I of the 17th amendment reads as follows:

The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

It is readily seen that there is a continuous change of language running throughout the Constitution and authorities on the Constitution, including words by James Madison, Alexander Hamilton, and many opinions of the Supreme Court. This language can mean but one thing, that the States have the sole power to determine the qualification of electors.

In the exercise of that constitutional power, 21 of our 50 States have adopted literacy tests. These literacy tests are a valid exercise of the right of the State to determine the qualifications of its voters. So long as these tests are administered to all applicants for registration, regardless of color or identity, and without discrimination, the Supreme Court has held many times that literacy tests are constitutional. As the Court said recently in *Guinn v. United States*, 238 U.S. 347:

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and, indeed, its validity is admitted.

In support of this principle, see also *Williams v. Mississippi*, 170 U.S. 213, 42 L. Ed. 1012 (1898), *Trudeau v. Barnes*, 65 F. ed 563 (CC5th 1933).

In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959) mentioned earlier, the literacy test provision of the North Carolina constitution was involved. In holding that a State may consistently with the constitution, apply a literacy test to all voters irrespective of race or color, the Court recognized that it is within the sole power of the State to determine the qualification of voters. The Court said:

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633; *Mason v. Missouri*, 170 U.S. 328, 335, absent of course the discrimination which the Constitution condemns. Article I, section 2 of the Constitution in its provision for the election of members of the House of Representatives and the 17th amendment in its provision for the election of Senators provide that officials will be chosen "by the people." Each provision goes on to state that "the electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex Parte Yarbrough*, 110 U.S. 651, 663-665; *Smith v. Allwright*, 321 U.S. 649, 661-662) it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315. While section 2 of the 14th amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of "the right to vote," the right protected refers to the right to vote as established by the laws and constitution of the State. *McPherson v. Blacker*, 146 U.S. 1, 39.

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Resi-

dence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. Cf. *Franklin v. Harper*, 205 Ga. 779, 55 S.E. 2d 221, appeal dismissed 330 U.S. 946. It was said last century in Massachusetts that a literacy test was designed to insure an "Independent and intelligent" exercise of the right of suffrage. *Stone v. Smith*, 150 Mass. 413-414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

In *Darby v. Daniel*, 168 F. Supp. 170, certain persons challenged the provisions of the Mississippi constitution requiring a literacy test. In the course of its opinion, the district court said:

Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States.

In support of this basic principle of constitutional law, the Court quoted from *Pope v. Williams*, 1904, 193 U.S. 621, 24, S. Ct. 573, 48 L. Ed. 817, as follows:

The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States, *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color, or previous conditions of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper ***

Mr. Chairman, my brief discussion today was restricted to the constitutional issue and I have not attempted to go into detail. Authorities have been cited plainly showing that the Congress does not have constitutional authority to enact this legislation but that the States have this sole power. Further, that the States themselves have enacted legislation providing literacy tests and that such tests are a valid exercise of the powers granted to the States.

In my judgment, this legislation should not be considered further by the subcommittee, the full committee nor the Senate. However, if this bill should be taken up on the Senate floor pursuant to the plans which have been announced, then I expect to discuss many more authorities and special points in alerting Members of the Senate and the Nation to the serious dangers of such legislation.

Should this proposal be approved by the Congress, signed by the President and upheld by the Courts, it would be irrefutable proof that the U.S. Constitution is gone. The passage of this bill would be fair warning to all of the people that any provision of the Constitution could be ignored or "read out" of the Constitution. It would be proof that the President and a majority of the Congress could do what they wish. Thus we would, in effect, no longer have a written Constitution.

Mr. Chairman, I especially thank the chairman of the committee for holding this session.

Senator ERVIN. I invite the Senator's attention to page 3 of S. 2750, where it says—

No person whether acting under the color of law or otherwise shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or to vote as they may choose in any Federal election, or subject or attempt to subject any other persons to the deprivation of any State in any Federal election.

I will ask the Senator from Mississippi if he agrees with me that the way this is phrased, "No person whether acting under the color of law or otherwise" it does not indicate a purpose to make it apply to individuals.

Senator STENNIS. I think so. I don't see any other interpretation.

Senator ERVIN. And has not the Supreme Court of the United States held on many occasions that the 15th amendment only applies to State actions, and that legislation cannot be adopted under it applying to individuals?

Senator STENNIS. The Senator is correct, that is the recollection of the Senator from Mississippi. That is a good point.

Senator ERVIN. Now, the other bill, S. 480, I would like to invite the Senator's attention to section 2 on page 3, to the phraseology—

All citizens of the United States who are otherwise qualified by law to vote in any election by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial division

and so forth.

Does that indicate that the purpose of this bill is to apply to all elections regardless of whether held for Senators and Congressmen for the National Congress, or for State or municipal officers?

Senator STENNIS. It is clear, and unmistakable; it would be all-inclusive.

Senator ERVIN. And has not the Supreme Court held in a number of cases that the only authority Congress has to legislate in respect to State elections is under the 15th amendment?

Senator STENNIS. Yes, the Senator is correct.

Senator ERVIN. If I may state a premise, it was admitted by the spokesman for the Civil Rights Commission, Dean Griswold, that this bill was aimed at the Southern States alone.

Senator STENNIS. Yes.

Senator ERVIN. Now, there are only seven Southern States that have a literacy test. I will ask the Senator from Mississippi if the Supreme Court did not hold in the *Lassiter* case that the literacy test established by the North Carolina Constitution and statute is perfectly valid under the Federal Constitution?

Senator STENNIS. That was the holding of the court, and, as I recall that was one of the recent cases.

Senator ERVIN. And did not the Supreme Court of the United States hold in the case of *Williams* against *Mississippi* that the literacy test prescribed by the State of Mississippi is valid under the Constitution of the United States?

Senator STENNIS. That is the holding of the Court undoubtedly, yes, that was the U.S. Supreme Court case decided in 1904.

Senator ERVIN. And then I will ask the Senator if the circuit court of appeals did not hold in the *Trudeau* case that the literacy test prescribed by Louisiana is perfectly valid under the Federal Consti-

tution, and did not the Supreme Court refuse to grant certiorari and review that decision in the *Trudeau* case?

Senator STENNIS. Yes, the Senator is correct. And that case was decided as recently as 1933.

Senator ERVIN. So that the Federal courts, which possess the judicial power of the United States, have held that the literacy tests prescribed by three of the seven Southern States are perfectly valid under the Federal Constitution?

Senator STENNIS. Correct.

Senator ERVIN. And now we have these peculiar bills which are proposed to be enacted by the Congress, which possesses none of the judicial power of the United States, reciting in effect that, notwithstanding the decisions of the Supreme Court of the United States and of the circuit court of appeals as to the literacy tests of three of the Southern States, these literacy tests are actually unconstitutional.

Senator STENNIS. That is correct. It goes into the very teeth, as the Senator says, of the Constitution.

Senator ERVIN. Do not these bills represent an effort on the part of the Congress to usurp the judicial power of the United States and to overrule the decisions of the Federal courts, including two decisions of the Supreme Court of the United States?

Senator STENNIS. Unmistakably; it goes into a field of legislation where it has no authority, and in order to get there it usurps the power of the judiciary, too.

Senator ERVIN. So if the writer of the book of Ecclesiastes had postponed writing that book until today he would not be able to say that there is nothing new under the sun, would he?

Senator STENNIS. Well, it is certainly an innovation. This law, as the Senator has said, goes just that far. And I say that if it should be adopted and passed, signed, and upheld that then really the Constitution is gone, and all the set precedents under it.

Senator ERVIN. I will have to say that I agree with the Senator from Mississippi; if these bills are passed by the Congress and signed into law by the President, and their validity is upheld by the Supreme Court of the United States, then I say that the States and the people of the United States have lost the protection of the written Constitution.

Senator STENNIS. We are back where we started.

Senator ERVIN. Only worse. We do not have any Alexander Hamiltons I say, or James Madisons around to set up a new one.

Senator STENNIS. It will be just the majority of the Congress and whoever happens to be President of the United States.

Senator ERVIN. Does the Senator think that I am straying very far from the truth when I say that these bills represent an effort to sell constitutional truth for a sorry mess of political pottage?

Senator STENNIS. I think unmistakably, you can't reasonably attribute any other idea behind it, except a pattern of that kind.

Senator ERVIN. I think counsel has one or two questions.

Mr. CREECH. Senator Stennis, you have addressed your remarks, sir, primarily to S. 480 and S. 2750.

Senator STENNIS. That is correct, yes.

Mr. CREECH. And, as you have said, there are literacy tests in some 20 or 21 States.

Senator STENNIS. Yes.

Mr. CREECH. Now, S. 2979 would change the voting laws in exactly 45, or 90 percent of all the States.

Now, in this particular measure, sir, as you will note on page 2 of the bill, the State would only be permitted to disfranchise an individual from voting in those instances in which he was unable to meet the reasonable age requirements, reasonable requirements as to length of residence, legal confinement at the time of the election, registration, and conviction of a felony. Sir, in the State of Mississippi, as in a number of other States, there is either a constitutional provision or a State statute which disqualifies idiots or insane persons from voting. Under the provisions of this bill they would be permitted to vote unless they were under legal confinement. Also, if this bill should adopt the criminal code definition of a felony, Mississippi could no longer disqualify certain people for certain acts here unless the imprisonment were, as provided by the Federal statute, for 1 year or more.

I wonder, sir, where in the Constitution is the power granted to Congress to enact such legislation?

Senator STENNIS. Well, I don't think it exists at all. I have not really studied S. 2979 enough to say where he proposes to get it except through this finding clause that he has here. Perhaps there. I concentrated on S. 2750 because I understood that was the one that was going to be called up, and I think that will be the one that will be before the Senate. And these others may be debated. But you certainly make a good point here about it.

He attempts to bottom his bill on the 14th amendment and on the 15th amendment and some other findings of fact.

Mr. CREECH. The statement has been made that whenever Congress has acted to change voter qualifications in the past, it has always done so by constitutional amendment and not by statute. Would you care to comment on that assertion?

Senator STENNIS. Of course we have had attempts here for years to pass the bill with reference to excluding the poll tax by legislative enactment. I think that has been before the Congress for, well, someone told me almost 30 years.

But it has always been defeated when it was brought into that ground.

Mr. CREECH. What they had specific reference to, sir, was the enactment of the 15th amendment to the Constitution and the 17th amendment to the Constitution.

Senator STENNIS. Yes. Well, it has just lately been recognized that that was the path to vote, and it was necessary to vote. And in Congress each time when the voters' qualifications came up they reiterated the previous provisions of the Constitution of the United States, bringing them up to date.

Senator ERVIN. We will recess until in the morning at 10 o'clock. (Whereupon, at 4:15 p.m., the committee recessed, to reconvene at 10 a.m., Friday, April 6, 1962.)

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

FRIDAY, APRIL 6, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 357 Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senator Ervin (presiding).

Also present: William A. Creech, chief counsel and staff director; Bernard Waters, minority counsel; and L. P. B. Lipscomb, professional staff member, Judiciary Committee.

Senator ERVIN. The subcommittee will come to order. The first scheduled witness is Andrew J. Biemiller.

The committee is glad to have you here.

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AFL-CIO; ACCOMPANIED BY THOMAS HARRIS, ASSOCIATE GENERAL COUNSEL

Mr. BIEMILLER. Thank you, Mr. Chairman. For the record, my name is Andrew J. Biemiller. I am legislative director for the American Federation of Labor & Congress of Industrial Organizations. I am accompanied by Mr. Thomas E. Harris, associate general counsel for the American Federation of Labor & Congress of Industrial Organizations, who in addition to my statement, has a statement on the constitutionality of the proposed legislation that we desire to submit for the record.

The American Federation of Labor & Congress of Industrial Organizations appreciates very much this opportunity to present to you our views on S. 2750 and other bills to protect the right to vote from arbitrary discrimination by literacy tests or other means.

There are three principal measures dealing with this subject which are before you for consideration. These measures are S. 480, introduced by Senator Jacob Javits and a bipartisan group of other Senators; S. 2750, introduced by Senate Majority Leader Mike Mansfield and Senate Minority Leader Everett Dirksen; and S. 2979, introduced by Senator Kenneth Keating who, like Senator Javits, is also joined by a bipartisan group of other Senators, a number of whom are also sponsors of the Javits bill. All three of these bills have the common objective of qualifying as a voter, notwithstanding existing "literacy," "understanding" or "interpretation," "educational" or similar per-

formance tests under the laws of 19 States, any otherwise qualified person who has completed at least six grades of formal schooling.

Before discussing the provisions of particular bills, there are a few general comments I would like to make.

Mr. Chairman, the AFI-CIO has long supported abolition of the use of "literacy," "understanding" or "interpretation," "education" or other similar performance tests to restrict the right to vote in Federal and State elections on grounds of race or color. Based on the experience of members of our affiliated unions and on the findings of Government agencies, such as the Department of Justice and the Civil Rights Commission, it is clear that such tests are frequently used in many areas of the country to deny the right to vote to many citizens based on their race or color. The use of literacy tests for such a purpose is an anachronism in a free society such as we are striving to achieve in the United States. Our form of government demands the widest possible availability of the right of suffrage for all citizens, without discrimination of any kind whatsoever.

For Congress to take action at this time in the civil rights field, however, which would be limited to abolishing the discriminatory use of literacy tests to deny citizens the right to vote, would amount to only a small step in the direction of eliminating unfair and unjust restrictions on the civil rights of U.S. citizens based on race, creed, color or national origin. We want to make it very clear that while we support enactment of an effective Federal statute to abolish the discriminatory use of such tests this stand should not be interpreted as in any sense a relaxation of our continued and insistent support of legislation to eliminate discrimination in other fields.

I would also like to point out, Mr. Chairman, that this is the third time in 5 years that a serious attempt is being made to broaden the suffrage. When Congress, in the Civil Rights Acts of 1957 and 1960, undertook to provide additional safeguards for the right of all citizens to vote, the argument was made that, if only the right to vote were assured to all persons without discrimination, it might be less necessary, or possibly even unnecessary, for Congress to deal legislatively with discrimination in such fields as education, jobs, and housing. We have had our doubts about this argument in the past, and we still have them. While we support elimination of restrictions on the right to vote, we continue to believe that elimination or restrictions on voting rights cannot and must not be a substitute for really meaningful legislation to eliminate discrimination and segregation in the fields of education, jobs, and housing.

Turning now to the measures to abolish or restrict the arbitrary use of literacy and similar performance tests as qualifications for voting let me say at the start, Mr. Chairman, that we definitely favor enactment of legislation to accomplish this objective, rather than a constitutional amendment. We see no legal necessity for resort to the device of a constitutional amendment to abolish the discriminatory literacy tests as qualifications for voting. We believe there is need for passage of such legislation and we urge favorable action on such legislation by the Congress at this session.

In our judgment, Mr. Chairman, Congress has ample authority under the 15th amendment to the Constitution of the United States to enact legislation needed to protect citizens against deprivation of their

right to vote on the basis of their race or color. The 15th amendment specifies that :

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Discriminatory application of voting qualifications to deny the right to vote to certain persons because of their race or color also violates the equal protection of the laws which is guaranteed to all persons under the 14th amendment. Section 2 of the 15th amendment and section 5 of the 14th amendment provide that Congress shall have power to enforce these amendments by appropriate legislation.

The constitutionality of this legislation rests upon this analysis: The right to vote for Federal officers is a right protected by the U.S. Constitution; it is not a privilege to be conferred or withheld at the whim of any State. For this reason Congress has the obligation to protect the exercise of this fundamental right. In discharging this duty, Congress cannot be restricted by any narrow and stultifying interpretation which would prevent adequate protection being afforded to citizens in the exercise of their right to vote. Therefore, a State has no constitutional license to impose such conditions upon the exercise of the right to vote for Federal officers as to disenfranchise citizens of the United States on ground of race or color.

We are aware, Mr. Chairman, that technical arguments have been made, based on the alleged exclusive authority of the States to regulate the conduct of elections, that a constitutional amendment is necessary to abolish or limit the authority of the States to make their own rules as to literacy or other qualifications of voters. It is true that the State may prescribe qualifications but in this connection it should be recalled that the basic right to vote for Federal officers is one which is given by the Constitution of the United States.

What, then, is the scope of the States power to prescribe qualifications? Is the States power in this respect completely without limitation? May the State, for example, declare that only named persons may vote? Has section 2 of article I in fact negated any constitutionally guaranteed right to vote? The U.S. Supreme Court, in the case of *United States v. Classic* (313 U.S. 299), decided this in the negative. The Court in the *Classic* case said that the right to vote does flow from the Constitution. That statement would be inconsistent with any construction of section 2 of article I which would in fact declare that the State has an absolute and unlimited right to grant or deny access to the ballot box.

Thus, if the State were to sanction fraud in the grant or denial of access to the ballot box, the view that the State power is absolute would affirm the constitutionality of such action. The fact is that the Supreme Court has negated that position. The obvious grounds for the Court's position are that fraudulent limitation on the right to vote cannot come under the head of "qualification" to officials because the State may not make bribery a qualification. Such a situation would clearly defeat the basic purpose of the constitutional guarantee of the right to vote.

Thus Congress has the right to regulate literacy as qualifications for voting because as the Civil Rights Commission found in its 1961 report—

A common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of "good character."

In its 1961 report, the Civil Rights Commission recommended unanimously—

that Congress enact legislation providing that in all elections in which, under State law, a "literacy" test, an "understanding" or "interpretation" test, or an "educational" test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education.

Nineteen States now require that voters demonstrate their literacy as a condition of being allowed to exercise the right to vote, according to data compiled by the Civil Rights Commission in its 1959 report, and the Commission has found that—

complex voter-qualification laws, including tests of literacy, education, and interpretation, have been used and may readily be used arbitrarily to deny the right of vote to citizens of the United States.

As the Civil Rights Commission has stated, there is no doubt that many qualified Americans are still systematically denied the right to vote today, 100 years after the enactment of the 15th amendment. In many localities, literacy tests, which may appear to be fair and open on the surface, are used to deny the right to vote to many citizens. In his state of the Union message, President Kennedy called attention to the "insidious" use of literacy tests to deny the right to vote.

As I pointed out, there are three principal measures dealing with the subject of literacy tests which are before this subcommittee for consideration. S. 480, however, seems to be comprehended within the somewhat broader terms of S. 2750, and many of its sponsors are also sponsors of S. 2979, the more recent bill introduced by Senator Keating. I shall, therefore, confine my discussion to S. 2750 and S. 2979.

In S. 2750 the Congress finds that it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials. I believe you will agree that only a very small number of American citizens, if any, would challenge this finding.

Under the bill, Congress finds, in addition, that the right to vote in Federal elections must be maintained free from discrimination or corrupt influence. This, too, is a finding with which I am certain very few Americans would disagree.

Under the bill, Congress further finds that many persons have been subjected to arbitrary or unreasonable voting restrictions because of their race or color and that literacy tests and other performance tests have been used in some States to effectuate arbitrary and unreasonable denial of the vote. I think that the Congress would be amply justified in making this finding.

The bill's basic finding is that persons who have completed six primary grades in an accredited school "cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogative of citizenship." This finding seems to me to be reasonable and a proper basis for legislation specifying the type of reasonable requirement that States may require of persons who vote in Federal elections.

Finally, the Congress would make a finding that large numbers of American citizens are denied the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is used, that these citizens are well qualified to exercise the franchise, that necessary information for the intelligent exercise of the franchise is available to them through Spanish-language news sources; and that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process. These findings, Mr. Chairman, relate to the fact that many Spanish-speaking Americans are denied the right to vote in a number of areas of the country simply because they were not able to read or speak the English language well enough to satisfy the election officials, although their qualifications for voting were otherwise no less than those of many English-speaking citizens who were accorded the right to vote.

In summary, Mr. Chairman, the bill's findings seem to me to be sound and constitute a reasonable and firm foundation upon which to base the substantive provisions of the bill.

Turning to these substantive provisions, it is important to note that S. 2750 does not abolish all literacy tests as a qualification for voting in Federal elections. It would simply bar the arbitrary use of such tests to deny the right to vote to citizens of the United States, including Spanish-speaking citizens of the United States and the Commonwealth of Puerto Rico.

The bill would add to the present legal prohibition against intimidation, threats, or coercion, under color of law for the purpose of interfering with the right of any person to vote in any Federal election, a new Federal offense, consisting of subjecting, or attempting to subject, any person to any "deprivation of the right to vote" in any election. Such deprivation of the right to vote would include (1) application to any person of more restrictive standards or procedures for voting than are applied to other persons similarly situated, and (2) denial of the right to vote to any otherwise qualified person on account of his performance in any examination, whether for literacy or otherwise, if such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or any accredited private school in any State or territory, District of Columbia, or Puerto Rico.

It seems to me, Mr. Chairman, that these provisions are modest and certainly reasonable. Arbitrary application of standards for voting to deny some people the right to vote because of their color or their language while granting the right to vote to other more favored groups is unfair and, I firmly believe, unconstitutional. Our law is based upon and embodies the theory that all American citizens are to be treated equally, insofar as their basic political and economic rights are concerned. Unequal treatment is abhorrent to us as American citizens.

Possibly some may quibble over the bill's provision that a person who has completed six grades of a public school or an accredited private school shall be deemed to meet the literacy requirements contained in State laws. It seems to me, however, Mr. Chairman, that this provision is clearly not unreasonable. Any more restrictive standard as a qualification for voting in Federal elections would, in my

judgment, be clearly unreasonable and would continue to enable election officials in some States to deprive many persons arbitrarily of the right to vote.

Senator Keating's bill, S. 2979, would also provide that a person who has completed six grades of formal education shall be deemed to meet literacy and other tests designed to assure a person's ability to read and understand as qualifications for voting and for registering to vote. The scope of this bill, however, is broader than that of S. 2750, since it would apply to elections "for any office established by or under the Constitution or laws" or any State, as well as to Federal elections. S. 2979 would also provide that the right of citizens of the United States to vote, to register or otherwise qualify to vote, or to have their vote counted shall not be denied, abridged or interfered with by the United States or any State for any reason except the following: (1) inability to meet age requirements; (2) inability to meet requirements of residence; (3) legal confinement at the time of election or registration; and (4) conviction of a felony. The bill would require that these tests be "uniformly applied within the State and its political subdivisions to all persons."

S. 2979 forbids "arbitrary inaction" as well as "arbitrary action" by any person "whether acting under color of law or otherwise," which denies, abridges, or interferes with, or threatens to deny, abridge, or interfere with, the right of any other person to vote, register or have his vote counted. The Director of the Census would be required to compile comprehensive information and statistics relating to voter registration in each State and the number of registered voters who vote in each State. Beginning with the next decennial census, such information and statistics would be compiled as part of the decennial census. These provisions of S. 2979, it seems to me, are clearly necessary and desirable from the standpoint of providing more adequate safeguards for the right to vote without regard to race or color. The subcommittee should, I believe, give sympathetic consideration to these provisions in determining what kind of voting rights legislation it wishes to recommend to the Senate. These provisions are in accord with recommendations of the Civil Rights Commission contained in its 1961 report and would go far toward lifting unfair and discriminatory barriers to full and equal suffrage which will deny the right to vote to many persons throughout the United States on the basis of their race, color, or language.

Voting rights legislation needs to be considered, Mr. Chairman, against the background of wholesale denial of voting rights to minority groups on many different grounds in many parts of the country. Despite the fact that some progress has been made recently in establishing equal voting rights, the AFL-CIO Executive Council was forced to report to our 1961 convention that—

In the South, only about 25 percent of Negroes are registered. In many counties in the South, Negroes have not sought to register and to vote because of intimidation, private as well as official.

According to the report issued by the U.S. Civil Rights Commission in September 1961, Negroes in some 100 counties in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee were denied voting rights by discriminatory practices, by threats and by intimidation. The Commission reported that "some States have given encouragement to discriminatory denials of the right to vote."

The legislation which this subcommittee is considering is long overdue and should be given favorable action by the Congress at the earliest possible date.

Thank you very much for the chance to appear here today, Mr. Chairman.

As I said, Mr. Harris, our associate counsel who is with me, is prepared to discuss our views on the constitutionality of the proposed legislation.

Senator ERVIN. I have to take issue with you as to the State of North Carolina. The spokesman for the Civil Rights Commission was here the other day, and he said if the situation everywhere were like it is in North Carolina, there would be no justification for passing these bills.

We have a Negro population of 1,116,000, and there have only been 39 complaints filed in the State of North Carolina.

Mr. BIEMILLER. Mr. Chairman, I shall be very happy to check that matter back. You note the statement comes from a statement prepared for our convention. And if we have offended your State unfairly, I apologize.

Senator ERVIN. We are used to being criticized. We have been for a 100 years.

As a matter of fact, in 1957 the then Attorney General of the United States, Mr. Brownell, appeared before this subcommittee and picked out one precinct in Greene County, N.C., one precinct in Chatham County, N.C., and one precinct in Brunswick County—that is three precincts out of 2,200 in North Carolina and used them as a justification for demanding the overhaul of all election laws in the United States. And, low and behold, when I called the State board of elections, I found out that each one of those complaints had been called to the attention of the State board of elections by the field secretary of the NAACP, and every one of them was corrected in time for the persons effected to register and vote in the primary, within less than a month after the complaints were filed. So I think we have a pretty good record down there considering the fact that we have a very active NAACP chapter. We have a very active State advisory commission, headed by a person who is very diligent, and comprising within its membership the head of the North Carolina Life Insurance Co., which is the largest Negro-owned and controlled financial institution on this earth, so I am told.

Mr. BIEMILLER. I am delighted to hear this is the case.

Senator ERVIN. Also I may say we have in North Carolina many fine Negro educators. We have aldermen of that race in Winston-Salem, Durham, Greensboro, and have had in the past in Southern Pines.

Illinois, Indiana, Ohio, Pennsylvania, New Jersey, New York, and the six remaining States have about 1½ million or 2 million more Negro inhabitants than North Carolina, and North Carolina employs about 1,000 or 1,100 more Negroes as teachers and principals of schools than all of those States combined. So I think we do very well in North Carolina.

Mr. BIEMILLER. I repeat, if I have unfairly mentioned your State I apologize.

Senator ERVIN. I told Dean Griswold that you cannot always rely on the figures. I said "The nonwhite population in the United States is about 10 percent or a little more," and I asked him "What is the nonwhite registration in Harvard Law School, how does it compare with the nonwhite population of the United States." He said he would have to admit it is very low. And I said, "Well now you can't infer from those figures that Harvard Law School is discriminating on the basis of color." He said "No." And I agree with him.

Do you have any questions?

Mr. CREECH. Thank you, Mr. Chairman.

Mr. Biemiller, just pursuing for a moment the question the chairman just asked you, on page 1 of your statement you say—

It is clear that literacy tests are frequently used in many areas of the country to deny the right to vote to many citizens, based on their race or color.

Sir, is the statement on page 8—is that the index for the areas of the country which you have in mind?

Mr. BIEMILLER. Page 8?

Mr. CREECH. Yes, sir. On page 8 you are quoting from your executive council report, the 1961 convention report.

Mr. BIEMILLER. And that in turn is quoting from the report of the U.S. Civil Rights Commission.

Mr. CREECH. Does your view differ from that report, sir, or did you have other areas of the country in mind?

You have said, sir, without identifying the areas of the country, on page 1 of your statement, that it is clear that such tests, meaning literacy tests—

Are frequently used in many areas of the country to deny the right to vote to many citizens based on their race or color.

I should like to inquire, sir, which areas of the country you have in mind.

Mr. BIEMILLER. The areas mentioned in the statement taken from the Civil Rights Commission, on page 8.

Mr. CREECH. Thank you, sir.

Now, sir, also on page 1 of your statement you say that all three of the bills have the common objective of qualifying as a voter, notwithstanding tests, any otherwise qualified person who has completed at least six grades of primary schooling.

Is it your opinion, sir, that Congress has the authority to qualify any person for the voting right?

Mr. BIEMILLER. May I refer that to our associate general counsel, Mr. Harris.

Mr. HARRIS. I have here, sir, a statement which we would like to submit for the record which elaborates in much more detail on the constitutional issues.

As the chairman pleases, I would be glad either simply to submit this for the transcript or go over it orally and attempt to summarize it.

(The statement of Mr. Harris follows:)

STATEMENT BY THOMAS E. HARRIS, ASSOCIATE GENERAL COUNSEL, AFL-CIO, ON S. 2750 AND OTHER BILLS TO PROTECT THE RIGHT TO VOTE IN FEDERAL ELECTIONS FROM ARBITRARY DISCRIMINATION BY LITERACY TESTS OR OTHER MEANS

My name is Thomas E. Harris. I am associate general counsel of the AFL-CIO, and appear here on its behalf.

My statement will deal only with the constitutionality of S. 2750 and other similar bills to protect the right to vote in Federal elections. Mr. Blemiller's statement deals with the merits of these proposals.

Let us consider first the Constitution as it stood when it left the hands of the founding fathers, prior to any amendment.

Article I, section 2, provides:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

(This language as to "Qualifications requisite for Electors" was subsequently made applicable by the 17th amendment also to the election of Senators.)

Article I, section 4, states:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Article I, section 8, clause 18, provides:

"The Congress shall have Power * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

A basic issue which was formerly much mooted was whether a voter possessing the qualifications laid down by a State for voting for the lower house of the State legislature derived his right to vote for Federal Representatives (under article I, section 2) and Senators (under the 17th amendment), solely from the State, so that only the State might protect the exercise of that right, or whether it was a Federal right derived from the Constitution, the exercise of which might be protected by Congress. However, this question was long since answered by the Supreme Court, which has affirmed in the broadest terms the power of Congress to protect the exercise of the franchise in elections—including primaries—for Senator and Representative. *United States v. Classic* (313 U.S. 200). The Civil Rights Act of 1957 and the 1960 amendments to that act rest, in part at least, on that doctrine.

It would appear that under the original Constitution Congress had plenary power to regulate the conduct of elections for the House of Representatives, and, after the 17th amendment, the Senate. However, that power was limited in two respects: (1) It applied only to congressional elections; not even reaching elections for President; (2) the States were empowered to prescribe the qualifications for elections, and this power was subject to no explicit, and possibly, though not certainly, to no implicit, restitution.

Let us consider now what changes were brought about by the "reconstruction" amendments.

In the first place, the due process and equal protection clauses of section 1 of the 14th amendment now operate as restrictions upon State laws prescribing the qualifications for voters. Section 1 of the 14th amendment has the same application to State action prescribing the "Qualifications requisite for Electors" as to any other State action.

Much of the argumentation against these bills seems to ignore the adoption of the "reconstruction" amendments, and to rest on the assumption that the power of the States to prescribe the qualifications of voters is absolute. The slightest reflection, however, should demonstrate that this is not so. If, for example, a State should enact a law that only persons with red hair may vote, there can be no room for doubt that the Supreme Court would hold the law

invalid under section 1 of the 14th amendment. Only a few days ago the Court ruled that the apportionment of seats in a State legislature is subject to challenge under the equal protection clause. Since the due process and equal protection clauses apply to all State action, they have equal application to all State laws or rules prescribing voter qualifications, regardless of whether the elections concern Federal, State, or local office.

That the Supreme Court is correct in holding that the general guarantees of section 1 of the 14th amendment were specifically intended to safeguard the right to vote is shown by section 2 of the 14th amendment, which provides that the congressional representation of a State shall be reduced in the proportion that it denies the right to vote to any of the male inhabitants of the State, "except for participation in rebellion, or other crime." Further, this sanction attaches not only to the right to vote at elections for Federal office but for "the Executive and Judicial officers of a State or the members of the Legislature thereof."

This constitutional directive has never been implemented, and some Members of the Congress may regard its provisions as extreme. Its meaning, however, is unmistakably plain, and if there are Members of the Congress who support the objectives of the bills before the committee, but are troubled (as I think they need not be) by doubts as to the bills' constitutionality, there is available, under section 2 of the 14th amendment, a powerful sanction which Congress may, if it wishes, employ to eliminate State restrictions on the franchise.

The 15th amendment to the Constitution is explicitly and exclusively directed to the protection of voting rights. Section 1 states that the right of citizens of the United States shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." Section 5 of the 14th amendment and section 2 of the 15th amendment each provides that Congress shall have power to enforce that amendment by appropriate legislation. The 15th amendment, like the 14th, applies to all elections, not simply to elections for Federal office.

Finally, the 19th amendment, in form closely patterned after the 15th, declares that the right to vote shall not be abridged on account of sex.

Thus the amendments have greatly broadened the powers Congress originally had under the Constitution to regulate elections. While Congress originally had power to regulate elections for Congress, it had no power to regulate elections for State office—or for the Presidency. That has been changed. Congress now has power to regulate State and Presidential elections not only to insure that no one be denied the right to vote on account of race, color, or sex, but that no one be denied the franchise by any State-prescribed voting qualifications violative of due process or equal protection. Congress can even, if it wishes, enforce universal suffrage, and in State as well as Federal elections, though only on penalty of curtailment of a State's representation in the House of Representatives.

What conclusions, then, are to be reached as to the constitutional validity of the bills before the committee?

If they are passed, their constitutional validity will, it appears to me, be sustained by the Court under sections 1 and 5 of the 14th amendment if the Court decides that Congress had a reasonable basis for concluding that literacy tests (or other similar tests) were being used to deprive voters of due process or of the equal protection of the laws. In other words, if the Court decides that the Congress had a rational basis for concluding that literacy tests were being used as a cover for impermissible discriminations with respect to voting, it will uphold the legislation. Similarly, the Court will uphold the legislation under the 15th amendment, if it decides that Congress had ground for believing that literacy tests were being used as a cover for denying persons the right to vote on account of race or color.

I gather that the draftsmen of these bills reached pretty much the same conclusions I have expressed with regard to the constitutional problems. Thus I note that S. 2750 (Mansfield) recites in section 1(c) that Congress finds "that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color" and "that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote * * *."

One argument that has been made against the validity of these bills is that they undertake to vest in Congress judicial power which is vested in the courts by article 3 of the Constitution, and what I take is in effect the same

argument, that "these measures undertake to legislate the truth of facts" and thus usurp the judicial function in violation of the fifth amendment.

These arguments misconceive the respective functions of Congress and the judiciary. The constitutionality of a vast amount of legislation turns on whether Congress has rational basis for deeming it necessary or desirable. In recognition of this it has become quite customary during the last 30 or 40 years for major legislation to begin with recitals of findings and policies which are in part factual finding or conclusions. One purpose of these recitals is to advise the courts as to why Congress deemed the legislation necessary or desirable. Thus all three of the major labor bills enacted by Congress in the last 30 years, the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act, begin with recitals of findings and policies.

When the constitutionality of legislation is challenged, however, the courts do not treat these findings as conclusive. They merely state the theory of the Congress as to why the legislation is necessary or desirable. These findings may facilitate the task of the courts, but cannot eliminate it. For example, in *NLRB v. Jones & Laughlin Steel Corp.* (301 U.S. 1), the opinion of the Court begins by setting forth in a footnote the "findings and policies" recited in the Wagner Act, but the opinion does not treat these recitals of fact as conclusive. Instead, the opinion reviews the history of industrial relations in this country, drawing from published materials from congressional and judicial sources, and from its own general background knowledge of the subject, and concludes that there is a rational basis for this legislation.

I do not mean that the Court will substitute its own independent judgment for that of Congress. Its role, rather, is to ascertain whether Congress could reasonably have reached the conclusion it did as to the necessity or desirability of the legislation. In performing its function the Court will look not only to the findings in the statute, if any (and there is no constitutional necessity for findings at all), but to information of public record, such as the records of congressional hearings and of judicial proceedings, reports of public bodies such as the Commission on Civil Rights, and matters of common knowledge. I do not propose to review the factual justification for this legislation, since Mr. Blemiller and many other witnesses have done so, but I see little reason to doubt that the Court would uphold the legislation.

Mr. HARRIS. In this study, we do reach the conclusion that Congress has this authority.

I couldn't answer your question briefly, without in effect—

Mr. CREECH. I would like to ask you this. You said you have concluded that Congress has this authority. Now which provision or provisions of the Constitution do you maintain gives Congress the authority?

Mr. HARRIS. I would say primarily the reconstruction amendment.

Mr. CREECH. That would be the 13th, 14th, and 15th amendments, sir?

Mr. HARRIS. The 14th and 15th amendments; the 1st section of the 14th amendment, the 15th amendment, and the enabling sections of the 2d amendment.

Mr. CREECH. I see, sir.

Now, sir, the late James G. Blaine, who was Speaker of the House of Representatives, and who was later a Member of the Senate, in speaking on the 15th amendment, said—

The 15th amendment now proposed did not attempt to declare affirmatively that the Negro should be endowed with the elective franchise, but it did what was tantamount in forbidding to the United States or to any State the power to deny or abridge the right to vote on account of race, color, or previous condition of servitude. States that should adopt an educational test or appropriate qualification might still exclude a vast majority of Negroes from the polls. But they would, at the same time, exclude all white men who could not comply with the test that excluded the Negro. In short, suffrage by the 15th amendment was made impartial, but not necessarily universal to male citizens above the age of 21 years.

I wonder, sir, if you would care to comment upon this statement reflecting the intent of Congress at the time these amendments were enacted.

Mr. HARRIS. As I am sure you know, in endeavoring to determine what the intent of the amendment was, this presents a pretty difficult question, because the amendments not only passed the Congress but also had to be ratified by three-fourths of the States. I don't believe that you could rely on the statement of one Member of Congress as a guide, the intent of the amendment, to the extent that you could, say, just with regard to normal legislation. The question of the whole intent of the country enters into it.

I don't, however, find much to quarrel with in Senator Blaine's analysis. It is in fact, I believe, pretty much in line with the analysis which I reach.

Do you have my statement there?

Mr. CREECH. No, I do not, sir. I only have the statement of Mr. Biemiller.

Mr. HARRIS. Well, let me hand it up.

Now, the conclusions which I reach on the basis of the 14th and 15th amendments are summarized on the middle of page 4. There I say that the constitutional validity of these bills will, it appears to me, be sustained by the Court under sections 1 and 5 of the 14th amendment if the Court decides that Congress had a reasonable basis for concluding that literacy tests or other similar tests were being used to deprive voters of due process or of the equal protection of the laws.

In other words, if the Court decides that the Congress had a rational basis for concluding that literacy tests were being used as a cover for impermissible discriminations with respect to voting—that is, discriminations violative of due process or equal protection—it will uphold the legislation under the 14th amendment.

Then I say that similarly, the Court will uphold the legislation under the 15th amendment, if it decides that Congress has ground for believing that literacy tests were being used as a cover for denying persons the right to vote on account of race or color.

If I caught your reading from Senator Blaine correctly, this last sentence is approximately in line with what he was saying.

Mr. CREECH. Well, of course that would be your interpretation, sir.

I would like to inquire as to what your feeling is with regard to the Supreme Court's decision in the case of *Minor v. Happersett*, in which the Court held, with regard to the 14th amendment, that it—

did not add to the privileges or immunities of a citizen. It simply furnished an additional guarantee for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose if at all through the States, and the State laws, and not directly upon the citizen.

Mr. HARRIS. I would think that probably that is still the Supreme Court's view, with regard to the privileges and immunities clause of section 1 of the 14th amendment.

I think the Supreme Court takes the view that that clause, even apart from the other clauses, would give the Federal Government the right to protect, say, the right to vote. But I don't think that it would regard that clause as a substitute restriction on the power of the States to prescribe qualifications of voters.

On the other hand, I think it is equally clear that the due process and equal protection clauses do operate as substantive restrictions on the power of the State to prescribe the qualification of voters. And of course that is exactly and explicitly what the 15th amendment is.

For instance, if a State—to take an absurd example—should pass a law that only redheaded people may vote, that law would certainly be held invalid under the due process and equal protection clauses of the 14th amendment. That the Supreme Court regards the equal protection clause as a substantive limitation on the action the States take with regard to voting is I think evident from the redistricting decision the other day.

Mr. CREECH. Yes, sir. As you have said, the Supreme Court not only can, but it has on occasion, held that literacy qualifications in some States were unconstitutional. By the same token, it has upheld, as recently as 1959, by a unanimous decision by the members of the present Supreme Court in the *Lassiter* case, that the literacy requirements of the State of North Carolina were constitutional. And although the Court has the power to declare that a literacy test in itself might be unconstitutional, this action would not ipso facto transfer the authority to legislate in this area to the Congress.

Mr. HARRIS. The Congress has authority, under the 14th amendment, to enforce by appropriate legislation the provision that no State shall deprive any person of due process of law or of the equal protection of the laws and under the 15th amendment, the provision with regard to the right to vote by reason of race or color. So that Congress does, under the enabling clauses of both of those amendments, have legislative power.

I believe that the constitutionality of these proposals rests primarily on that grant of authority to the Congress.

The issue which would be before the Court, if this legislation came before it, would not be the same as the issue on a direct challenge to the validity of a State law by an individual voter. There the voter would have to show, under the 15th amendment, that the particular State qualification had been used against him as a cover for discrimination on account of race or color. Under the 14th amendment he would have to show that it was used as a cover for some discrimination that violated due process or equal protection.

Now, if this legislation is passed, it would constitute a judgment by the Congress that these voter qualification laws and other similar laws are being so widely used to effect denials of the right to vote in violation of due process, equal protection, or the 15th amendment that a broad remedy by Federal statute is necessary.

Now there, I think, the question before the Court will be whether Congress could reasonably make that judgment.

I don't mean that the Court will substitute its judgment for that of Congress. It will accord great weight to the judgment of Congress. But if the Court decides that Congress had some basis for reaching that conclusion, I think it will sustain the legislation under the enabling clauses.

The question in that case will not be whether there is a right to vote to an individual voter, an unconstitutional denial of such right in violation of due process or equal protection, or the 15th amend-

ment. The question will be whether Congress had some reasonable basis for making the judgment that the sort of protection embodied in these bills was necessary to safeguard the rights of persons under the 14th and 15th amendments.

This is an issue which has not been before the Court in this form.

Mr. CREECH. Sir, I would like to inquire at this point. If, as you say, Congress has the authority to legislate voter qualifications, then why has Congress not taken this easier means of doing so in the past, when it has changed voter qualifications? Why has the Congress consistently resorted to constitutional amendments, rather than legislation, to change voter qualifications, if it in fact has the power which you say it has?

Mr. HARRIS. That is a question, I think, which calls for a political answer rather than for a constitutional one. The Congress these days has passed a number of laws of the sort that it hasn't passed in years past. Mr. Biemiller made the point that legislation of this sort was long overdue. As a matter of fact, if you take a look at the 2d section of the 14th amendment, you will find that it provides that the congressional representation of a State shall be reduced in the proportion that it denies the right to vote to any of the male inhabitants of the State, except for participation in rebellion or other crime. You will note, too, that this sanction attaches not only to the right to vote at Federal elections, but for the executive and judicial officers of a State, or the members of the legislature thereof.

This directive in section 2, of the 14th amendment to reduce proportionately the representation of a State in the House for denials of the right to vote on any ground, except participation in rebellion or other crime, could hardly be plainer. Yet it has never been implemented by the Congress. I don't think that failure to implement it can change the plain meaning of the constitutional provision, however. If you are really troubled about a source of constitutional power, there is one beyond cavil. It may be an extreme provision in the view of some members of the committee, but there it is. And it is a perfectly clear source of authority for Congress to correct these denials of the right to vote, and in fact to impose universal suffrage, if it is so disposed.

Mr. CREECH. I would assume, that you would not presume to take any section of the Constitution out of context, and that certainly no single provision is interpreted by itself alone.

Mr. HARRIS. No, I wouldn't suggest that.

Mr. CREECH. Well, then, I would like to inquire, sir, if you would not do that, with a view to what you have just said, would you comment on the Supreme Court holding in the case of *Pope v. Williams*:

That the whole control over suffrage, and the power to regulate its exercise is still left and retained by the several States with the single restriction that they must not deny or abridge it on account of race, color, or previous condition of servitude.

Mr. HARRIS. Well, speaking of taking an item out of context, you can of course pull all sorts of sentences out of all sorts of Supreme Court decisions.

Mr. CREECH. This was the ruling of the Court in this case, in holding that the State of Maryland, and indeed not only that State, but that each State has the whole control over suffrage, and the power to regu-

late its exercise is still left with and retained by the several States, with one single restriction. And again this is not unique, as you must know in your research on this, that this has been consistently the position of the Supreme Court. It has been reaffirmed as recently as 1959 in a unanimous decision in the *Lassiter* case. This has been consistently the case. The Court has never taken another position.

Mr. HARRIS. I must beg to differ with you. I would say that the quotation which you have lifted from the opinion obviously is from a case which happened to involve the 15th amendment.

Mr. CREECH. That is right.

Mr. HARRIS. The Supreme Court obviously did not mean that there were no other restrictions on the powers of the States.

For example, there is the women's suffrage amendment.

Mr. CREECH. As far as voters qualifications is concerned, it did.

Mr. HARRIS. As far as voter qualifications are concerned—

Mr. CREECH. And that is the only issue before us here today.

Mr. HARRIS. These are rather difficult questions, and I would be glad to try to give you my views. But I don't believe I can make them clear, unless I am allowed to finish my sentences, sir.

Mr. CREECH. Well, please finish your sentences. But I would like for us to stay on the bills which are before the subcommittee. I should like to ask you, sir, if you would confine your discussion as much as possible to the specific bills and their provisions.

Mr. HARRIS. Do I take it you do not want me to comment further on this sentence you read from the Supreme Court decision?

Mr. CREECH. No. But I would just like to limit the testimony to the proper scope of the hearings.

Mr. HARRIS. Well, I would say that the women's suffrage amendment makes it perfectly plain that that sentence you read cannot be taken literally, as meaning there is no restriction on the State's power to prescribe qualifications for voters, other than that in the 15th amendment.

Mr. CREECH. Well, the 19th amendment was enacted subsequent to the decision of the Court. It is not inconsistent with this case.

Mr. HARRIS. I thought you said this was a quite recent decision.

Mr. CREECH. No. I am just saying this philosophy has been consistent. This is what the Court has said time and again. The Court reiterated it in the *Lassiter* case. It quoted the *Guinn* case in the *Lassiter* case; the Court quoted the Massachusetts Supreme Court decision in the *Stone* case, saying that literacy tests in themselves are not discriminatory. I will give you the exact wording:

It was said last century in Massachusetts that a literacy test was designed to assure independent and intelligent exercise of the right of suffrage. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

The Court has consistently held that voter qualifications is an area in which the States might, appropriately, have the sole authority.

Now, the *Classic* case, which was cited by Mr. Biemiller, had nothing to do with voter qualifications as such. There was an entirely different question at issue.

Senator ERVIN. Except it was said in the *Classic* case that qualifications of voters in senatorial and congressional elections were fixed by the second section of the first article of the Constitution, which

said that the voters must possess the qualifications of electors of the most numerous branch of the State legislature.

In other words, the *Classic* case is a decision which holds in effect that the Constitution itself prescribes the qualifications for voters, and it adopts as the qualifications for voters for Senators and Congressmen the qualifications required by State law for the most numerous branch of the State legislatures.

Mr. HARRIS. I think, sir, that might have been a tenable construction of the Constitution before the Civil War and the Reconstruction amendments. However, I think it is pretty clear that the due process and equal protection clauses of the 14th amendment apply to the power of the States to prescribe voter qualifications, just as they apply to all other portions of the Constitution. I think the same thing is true about—

Mr. CREECH. What authority do you base that on? Do you have Supreme Court decisions on which to base your statement?

Mr. HARRIS. The most recent one is several days old now.

The Tennessee—

Mr. CREECH. That does not concern voter qualifications as such.

Mr. HARRIS. It went well beyond being concerned with voter qualifications, and held that the failure of the State to redistrict might present a question of violation of the equal protection of the laws under the 14th amendment.

Mr. CREECH. The courts have consistently taken jurisdiction over these cases which we have cited for you. And in every instance the Court has held that voter qualifications are within the purview of the States and the States alone, with the exception of those instances in which there is discrimination against an individual on the basis of race, color, or previous condition of servitude.

Are there any cases to your knowledge, sir, in which that is not true?

Mr. HARRIS. The cases that you describe all arose under the 15th amendment. Now, the decision in the *Tennessee* case makes it quite clear that the equal protection clause does operate as a restriction on the authority of the States not only with regard to prescribing the qualification of voters, but as to how they discriminate against the voters in weighting their vote by districting or failure to redistrict.

If any State attempted to deprive women of the right to vote, because they are women, again you would get a case under the equal suffrage amendment. The fact that these cases happen to have come up under the 15th amendment has—doesn't prove that the 14th amendment does not apply, too.

Your argument seems to me to carry you to the conclusion that it would be all right for a State to say that only redheaded men can vote, if you take the position that the only restriction is the 15th amendment. You would literally be forced to that conclusion, which I think is pretty plainly untenable.

Mr. CREECH. I would like to ask, sir, with regard to that, and to the equal protection clause, in your study of these bills, specifically S. 2979, and S. 2750, is in your feeling, sir, that a State might legislate today with regard to voter qualifications and allow a person to meet the literacy requirement who has knowledge of one language other than English—just for the sake of example, since Spanish is specified,

let us say Spanish, and not deprive those who speak languages other than English or Spanish of the equal protection of the law?

Mr. HARRIS. I think your question there would be whether the language singled out by the State—whether there was a sufficiently reasonable basis for singling out that language so that there was no violation of the equal protection clause.

If, for example, the State legislature, after holding hearings, decided that there were ample newspapers covering political subjects in the Spanish language, or in the Yiddish language, or something like that, and on that basis concluded that an ability to read in those tongues should be a sufficient qualification, I think the Supreme Court would probably uphold that, even though the State didn't say that ability to read some other language, such as Portuguese, in which there were no newspapers. I think it would be a question of reasonableness.

Mr. CREECH. What I have in mind, sir, is where Spanish alone is specified, even though such areas of the country as, for instance, New York, have sizable Italian-speaking populations, perhaps Yiddish, perhaps Polish. I understand in various parts of the country there are many citizens who speak languages other than English and Spanish.

Now, would it be reasonable to select Spanish alone as the additional language to the English language?

Mr. HARRIS. I think that it simply is a question of reasonableness, and that if we are assuming it is New York, the Court would try to decide whether the New York Legislature had a reasonable basis for distinguishing between Spanish and other languages.

In recent years, the tests of constitutionality applied to State legislation under the equal protection clause are not very specific. I think about all you can say is that it is a question of reasonableness. And I wouldn't be absolutely confident either way.

One ground for upholding the reasonableness of such a distinction might be that there are more people who speak that particular language in the State. I think the State could pick out a major foreign language, and wouldn't have to list everyone in order to avoid violating equal protection.

Mr. BIEMILLER. May I suggest, Mr. Chairman, on that point, while I realize it has never been brought to a Court test, that the State of New Mexico not only has such legislation, but its legislature is bilingual. You may speak in Spanish in the New Mexico Legislature, because of the obvious rule of reasonableness of the prevalence of the Spanish tongue in that State.

Mr. CREECH. Of course Hawaii has a similar provision with regard to literacy. And I believe Louisiana provides for one who has a knowledge of his mother tongue—in other words he must read or write or understand or speak his mother tongue, whatever language that might be.

But on the basis of the equal protection clause, I was interested in having Mr. Harris comment on that, because I wonder, sir, would it be your feeling that the Federal Government, thinking in terms of the Supreme Court decisions in *Hurd v. Hodge*, and *Bolling v. Sharpe*, where the Court has implied the equal protection clause is implicit in the due process clause of the fifth amendment, would it be appro-

prate for Congress to enact such legislation, or could it enact such legislation, without violating the fifth amendment, in view of the fact that throughout this country there are large segments of the population that do not speak either English or Spanish. There might be in certain areas of the country people who speak neither. For instance, there are large Indian populations in this country who do not speak either language sufficiently well to be called literate in either.

Mr. HARRIS. Well, I think you have to say, as respects the Spanish language provisions of these bills, that there is a double test that must be met. First, as you say, the equal protection clause of the 14th amendment probably is to be read into the 5th amendment as a limitation upon the validity of Federal legislation. So that one test would be whether acceptance of Spanish as a permissible language would deny equal protection, and hence due process to people who were literate in other languages.

As I have indicated with respect to the States, I think that the same thing would be true with respect to the Federal legislation. Your question here would be one of reasonableness.

But you also have the further question that we were discussing earlier, of whether the Congress could reasonably conclude that this sort of law is necessary to implement the due process and equal protection clauses—that is, that it is necessary to protect voting rights under the equal protection and due process clauses, and to prevent discriminatory denials of the right to vote in violation of those clauses.

You have this dual barrier that the legislation would have to surmount.

Mr. CREECH. Mr. Biemiller, on page 2 of your statement—

Senator ERVIN. Before you leave that—Mr. Harris, doesn't your argument overlook the fact that the fifth section of the 14th amendment, and the second section of the 15th amendment, and I might say the conclusion of the second section of the 17th amendment—do not empower Congress to legislate generally on the subject. Those sections merely authorize Congress to enforce the provisions of these particular amendments by appropriate legislation. And the only legislative power of Congress is to enforce a prohibition upon State action. That point has been brought up a number of times—for instance in the *Civil Rights* cases, with regard to the due process clause of the 14th amendment. That case holds that the last section of the amendment invests Congress with the power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition, to adopt appropriate legislation for correcting the effects of such prohibitive statute laws and State acts, and thus to render them in effect null, void, and innocuous. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation, but it provides modes of relief against State legislation or State action of the kind referred to.

In other words, these bills do not constitute, in my opinion, appropriate legislation, because they do not attempt to prohibit a State's denying or abridging a man's right to vote on account of his race, color, or previous condition of servitude, and they do not attempt to enforce the prohibition against the State, denying a person the right to vote on account of sex. But they provide a Federal standard or substitute for all of the State literacy tests. They undertake to describe what a literacy test shall be, and make a substitution for it.

And therefore, they are not appropriate legislation in my judgment, because they go far beyond enforcing a prohibition. They trespass on a domain which was reserved to State legislation under section 2 of article I, do they not, since qualifications of electors for Senators and Congressmen shall be the same as the qualifications requisite for electors of the most numerous branch of the State legislature. In other words, these bills would allow Congress to usurp and exercise the power to prescribe literacy tests, which are clearly vested in the States, as defined by section 2 of article I.

Mr. HARRIS. Well, I would agree that the Congress could not enact this legislation, say under the 15th amendment unless it concludes that these literacy tests are being used as a cover for denial of the right to vote on account of color. Under the 14th amendment Congress would have to conclude that these literacy tests are being used for unconstitutional discrimination against voters in violation of equal protection or due process, and as a matter of fact, that any literacy requirement in excess of completing six years of school is in all probability a denial of equal protection or due process.

Now, I notice that the bills do contain recitals to that effect, so that I think the draftsmen of the legislation pretty much reached the conclusion that its validity did depend on whether Congress could reasonably reach these conclusions. That, I think, would be the issue before the court.

Senator ERVIN. Now, here I believe you and I are in substantial agreement. But I don't think Congress has any right to legislate. A very succinct and recent statement to this effect is found in 18 American Jurisprudence on Elections, section 47. "The 15th and 19th amendments granted no voting rights except that of not being discriminated against on the grounds of race, color, previous condition of servitude, or sex."

Now, this bill has some preambles which refer to racial matters. But the operative part of the bill itself, if I may borrow the word from the old spiritual, doesn't say a mumbling word about racial matters. It strikes down State literacy tests. It says certain kinds of literacy tests that exceed the requirement of a sixth grade education are arbitrary, unreasonable, and in effect unconstitutional. Now, what is the justification. There are 50 States in the Union. There is nobody insinuating that there are any inequities in this field except in the South, which has been the whipping boy for 100 years.

Now, what justification would Congress have to deprive all of the 50 States outside of the 7 Southern States which have literacy tests, of their right to prescribe literacy tests?

Mr. HARRIS. Well, sir, I don't think that this business about people who are literate in Spanish is aimed at the Southern States.

Senator ERVIN. No. I would say that is aimed at New York.

Mr. HARRIS. I think that you are correct that the constitutionality of the bill does rest on there being some reasonable basis for the recital, for example, in section 1 (c) of S. 2750, that Congress finds that "many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color." That is the theory on which I say this bill would come under the 15th amendment.

Senator ERVIN. Provided the operative part of the act was also under the 15th amendment. This is not under the 15th amendment.

It applies to any denial of any person. It says you cannot deny any person the right to vote. It has nothing whatever to do with race, color, or previous condition of servitude or sex. It says any literacy test which is higher than the requirements of a sixth grade education—

Mr. HARRIS. Well—

Senator ERVIN (continuing). Is invalid.

Mr. HARRIS. The recital in the bill then goes on—

That literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote.

Mr. HARRIS. I think I would analyze that as you do, as seeking to bring the bill under section 1 of the 14th amendment.

Now, the gentleman to your left—I am sorry I don't know his name.

Senator ERVIN. Mr. Creech.

Mr. HARRIS. He mentioned that the second section of the 14th amendment could not be read by itself. That is the section about reducing proportionately the representation of States denying the right to vote to anyone.

Now, I think that is so. And I think that indicates that under the 14th amendment, Congress was meant to concern itself with these general denials of the right to vote.

Senator ERVIN. Well, this is quite interesting. Do you agree with me that a State law prescribing qualifications for voters which applies to all persons of all races in like circumstances would not offend the due process clause or the equal protection of the law clause of the first section of the 14th amendment?

Mr. HARRIS. I would think such a law would not be—not absent legislation like this—be invalid on its face. It might be invalid in application.

Senator ERVIN. The law wouldn't be invalid. If it was abused, it would be the practice under the law that would be invalid.

Mr. HARRIS. Yes.

Senator ERVIN. And I take the position if the law is valid on its face, the law is valid, and Congress cannot adopt legislation to nullify the law. It can adopt legislation to prevent a wrongful application.

Mr. HARRIS. I think that, in effect, Congress is undertaking to define, with some greater specificity, a concept of due process and equal protection as applied to the right to vote. And they are undertaking to do that under the enabling clauses.

Senator ERVIN. Well, now, the enabling clause is to enforce the prohibition that the State shall not deny anyone within its jurisdiction due process of law, or equal protection of the law.

Now, I was intrigued by your reference to the second section of the 14th amendment, which authorizes Congress to reduce the representation of a State in the Congress to the extent that male citizens of the State are denied the right to vote. There are some decisions under that. I call attention to one—*Storm against Smith*, which is a decision of the Supreme Judicial Court of Massachusetts, 159 Massachusetts 414, 34 Northeastern 521. And here is what is said in that case:

This section distinctly recognizes the right of a State to deny or abridge the right to vote of the male inhabitants who are 21 years of age, and it is well known that many of the States have from time to time, by an impartial and

uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right.

Now, that decision of the Judicial Supreme Court of Massachusetts says section 2 recognizes the fact that the States do have a right to deny people the right to vote on the basis of qualifications if the qualifications they prescribe are uniform. And the same is said in the case of *United States v. Anthony*, which is a circuit court of opinion from New York, reported in 24 Federal cases 14,459. "Not only does this section"—that is section 2 of amendment 14—

Not only does this section assume that the right of male inhabitants to vote was a special object of its protection, but it assumes and admits the right of a State to deny to classes or portions of male inhabitants the right to vote which is allowed to other male inhabitants, and the regulation of such is thereby conceded to the States as a States' right.

So I think the second section of the 14th amendment under these decisions—and I might add under one decision of the Supreme Court, recognizes States do have a right to prescribe qualifications, notwithstanding the 14th amendment, provided the qualifications are uniform.

Mr. HARRIS. I don't think there is any doubt that the authority to prescribe qualifications for voters still rests in the first instance with the States. And I would agree that section 2 of the 14th amendment is written upon that assumption. It says however that if the States do restrict the franchise in any way, they do so at their peril, in that the Federal Congress can, if it wishes, reduce their representation in the House of Representatives.

That is a specific sanction given Congress in section 2. Section 5 gives Congress the much more general power to enforce by appropriate legislation the provisions of the amendment.

Senator ERVIN. To enforce by appropriate legislation the provision which prohibits the State from denying due process or law, or equal protection of the laws and so on.

Now, as a matter of fact, a statute which applies alike to all people under like circumstances does not offend the equal protection of the laws clause of the first section of the 14th amendment, does it?

Mr. HARRIS. I would think it would not normally do so.

Senator ERVIN. Now, isn't this a correct interpretation. Under the original Constitution, section 2 of article I, the Constitution adopts as its own qualifications for voting for Senators and Congressmen, the qualifications prescribed by State law for electors of the most numerous branch of the State legislature?

Mr. HARRIS. Yes, that is the original Constitution.

Senator ERVIN. And there is not anything in the Constitution, is there, that qualifies that power of the State, except the 14th, the 15th, and the 17th amendments?

Mr. HARRIS. It is the 19th amendment, actually, rather than the 17th. The 19th is the women's suffrage amendment.

Senator ERVIN. Yes.

Mr. HARRIS. The 17th deals with the election of Senators.

Senator ERVIN. Yes, you are correct in that. In other words, the qualifications are set by the Constitution itself, in section 2 of article I, relating to Congressmen, and in the 17th amendment, relating to Senators. And it is inconceivable that if the 14th or 15th amendments were designed to limit the power of those States in any way, except as

specified in those amendments, Congress would never have adopted the 17th amendment, prescribing again those qualifications in the same language as section 2 of article I.

Mr. HARRIS. Well, I would suppose that the 14th and 15th amendments, and also the 19th, apply to all of the provisions of the Constitution, and to all State powers under any of their provisions including both the original Constitution and article XVII.

Senator ERVIN. Is it not true that the only qualification made upon the power of the States to prescribe qualifications for Senators and Congressmen by the 19th amendment is that the State cannot deny or abridge the right to vote on the grounds of sex?

Mr. HARRIS. Yes, Senator.

Senator ERVIN. Now, Congress could not under that amendment adopt any legislation that would enforce anything except to prevent the denial of the right to vote on account of sex, could it?

Mr. HARRIS. Yes, Senator; I fully agree with that.

Senator ERVIN. Well, then, I come now to the 15th amendment. The 15th amendment merely prohibits the United States or any State from denying or abridging the right to vote to any citizen of the United States on the grounds of race, color, or previous condition of servitude. Now, does Congress have any power to enact any legislation under the 15th amendment except a law to prevent the denial or abridgement of the right to vote of a citizen of the United States on the grounds of race, color, or previous condition of servitude?

Mr. HARRIS. I would think not. But I would think this legislation can be upheld under that amendment if the Congress reasonably concludes that literacy tests or other similar tests have been widely used as a cover for denial of the right to vote because of race. If it concludes—and I think you asked my view on this earlier—if they conclude that this has happened in a number of States, I think Congress could adopt a preventive measure, which applies generally through the country, if the preventive measure is reasonable. The fact that it would affect States and limit the reach of their literacy qualifications in States where there had been no showing of denial of the right to vote on account of color would not, I think, invalidate the legislation.

Senator ERVIN. I agree to this extent—that Congress could adopt a law which was reasonably designed to prevent a State from denying a person the right to vote on account of race, color, or previous condition of servitude. But Congress could not under this, as it does in this bill, undertake an affirmative course of action to usurp and exercise the power of States to prescribe literacy tests, and that is what this does.

Mr. HARRIS. Well, if Congress, under the recitals of the bill, finds that in effect these literacy tests are being used, No. 1, to violate the fifth amendment, No. 2, to discriminate arbitrarily in violation of the 14th amendment—

Senator ERVIN. The recitals are nothing but an expression of opinion with respect to Congress, are they?

Mr. HARRIS. They are not binding on the court. I think they serve as a guide to the constitutional theory of Congress in enacting the legislation.

Senator ERVIN. Well, do you agree with me that the Mansfield and Dirksen bill—I believe that is 2750—the only part of that bill that has any operative influence is in the second section and the third section, and there is no operative influence in the preambles and whereases?

Mr. HARRIS. Well, I think that while these recitals in the preambles and whereases are not absolutely binding on the Supreme Court, it does give weight to the judgment of Congress. So that if Congress adopts a bill with these recitals, the Supreme Court would not feel free to substitute its own independent judgment on these matters.

The question before it would be whether Congress had some reasonable basis for these recitals. To that extent I think they have some effect.

Senator ERVIN. Do you think that if you eliminated the preambles and the recitations and the whereases, the bill would be constitutional—the operative provisions?

Mr. HARRIS. I think it probably would. I don't think that these sort of recitals, that have become quite customary in legislation these days are essential, although I think they make it easier for the court to see what the constitutional theory is, and also for the legislators in voting on it. But I cannot regard them as essential. I don't think they appeared in legislation at all up until 40 years or so ago.

Senator ERVIN. If you eliminated the whereases and the preambles to this bill, you would just have a section under which Congress would attempt to prescribe a literacy test and invalidate all State literacy tests inconsistent with it, wouldn't you?

Mr. HARRIS. Yes.

Senator ERVIN. And no reference whatever to the race, color, previous condition of servitude or sex.

Mr. HARRIS. The court would then be faced with the problem of trying to figure out what theory Congress had in passing this.

Senator ERVIN. Now, what would be your opinion on this.

Say we take the State of Pennsylvania. Suppose the State of Pennsylvania was trying to apply this in that State, and the State of Pennsylvania says, "These findings don't apply to us." Would it have a right to contest their validity?

Mr. HARRIS. I think not, if there were a number of States where they did apply. If there are abuses which exist in some areas which would justify this legislation, or which Congress could conclude justified it, I think it couldn't be challenged on the ground that these abuses didn't exist elsewhere.

You people passed some laws a while back to regulate union elections, for example, on the finding that there were irregularities in a certain number of unions. I don't think that a union could come in and say, "This kind of stringent regulation can't apply to us, because we are clean as a hounds tooth, and no one has ever pointed the finger at us."

Senator ERVIN. Well, that would be a rather clear conclusion to me. The Congress has no power whatever to do anything under the 15th amendment unless some citizen of the United States is having his right to vote denied or abridged on account of his race, color, or previous condition of servitude. Notwithstanding the fact that more than 40 States of the Union are not offending the right to vote in any particular, and are not violating the 15th amendment, they would be

robbed by congressional legislation of their rights to prescribe qualifications for their own voters.

That is certainly visiting the sins of the supposed guilty upon the innocent, isn't it?

Mr. HARRIS. Well, that is the way we felt about the Landrum-Griffin Act, too.

Senator ERVIN. Well, there is an old expression, it all depends on whose ox is gored. Frankly, as far as I am concerned, this bill does not bother me too much, because I do not think it will affect the rights of anybody not registered except for half a dozen people in the whole State of North Carolina. But I do believe the only security that the people of the United States have is in upholding the Constitution. And I cannot imagine how the Founding Fathers could have found simpler words in which to say, as they did say, that the qualifications of the voters for Senators and Congressmen shall possess the qualifications requisite for the electors of the most numerous branch of the State legislatures. And yet here is a bill which comes along and says we are going to set aside that provision of the Constitution, because 7 or 8 States out of the 50 may be guilty of inequities violating the 15th amendment.

Let me ask you one other question.

Is it not a fact that the Supreme Court of the United States upheld the validity of the North Carolina literacy test, which tests ability to read and write a section of the State constitution in the English language, in the *Lassiter* case.

Mr. HARRIS. I think so. And I would think such a statute valid on its face.

Senator ERVIN. But under this bill, North Carolina could not require a man to read and write a section of the North Carolina Constitution if he could show he had completed a sixth grade education in Puerto Rico, could it?

Mr. HARRIS. That would be the effect of it.

Senator ERVIN. And did not the Supreme Court also hold in the case of *Williams v. Mississippi* that the Mississippi test was valid?

Mr. HARRIS. I do not think there is any question that, absent Federal legislation, a literacy test qualification is valid on its face, though it might be held invalid in application in a particular case, if the registrar or someone applied it unfairly or unreasonably or to deny the right to vote because of race.

Senator ERVIN. Now, the circuit court held the Louisiana test was valid in the *Trudeau* case, and the Supreme Court of the United States refused to grant certiorari to review that decision. In addition to these decisions I have already called attention to the *Pope* case.

In the *Pope* case, Maryland had a requirement that any person moving into Maryland who wanted to register and vote would have to go before the county clerk and give notice of his intention to become a resident of Maryland, and his intention to register. This requirement was attacked on the grounds it was an unreasonable requirement.

The Supreme Court held in that case that Maryland had the power to prescribe that law, and whether the law was reasonable or unreasonable, is not a Federal question.

Now, in the light of those things, is this not a peculiar bill?

Here are the Federal courts, which possess all the Federal judicial power of the United States. They have adjudged that the State literacy test prescribed by North Carolina, Mississippi, and Louisiana are perfectly consistent with the Constitution of the United States. And then Congress comes along, Congress who has none of the judicial power, and says that the Supreme Court is all haywire, that these are statutes, these literacy tests are arbitrary, unreasonable, and unconstitutional.

Do you not think that is rather a queer way for Congress to act?

Mr. HARRIS. I do not think that the question of the validity of these bills is the same question as the constitutionality of the State laws.

I think there is a different question that would be presented to the courts.

I think the substantive issue on which we are differing probably is whether the Congress has any power to define what constitutes due process of law or equal protection of the laws under the 14th amendment.

I think this bill rests on a conclusion by the Congress that literacy tests, to the extent that they require more than completing six grades of education, do involve a denial of equal protection, do involve a denial of due process.

As I understand it, sir, you are taking the position that Congress has no power to define in any substantive way the reach of due process or equal protection.

Senator ERVIN. I do, because I say that the question of what a constitutional provision means, and whether a constitutional provision outlaws a particular course of action or does not, is a judicial question, and not a legislative question. And that when Congress undertakes to say that the Supreme Court was wrong, when it upheld the literacy test of North Carolina in 1959, that Congress is trying to usurp the judicial power of the United States to some extent.

Mr. HARRIS. Well, I would think——

Senator ERVIN. In other words, the third article of the Constitution says the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to time establish.

And then it says that these courts have jurisdiction of all controversies at law or equity arising under this Constitution.

Now, here is Congress attempting to adjudge that certain States have forfeited their constitutional rights in the preamble of this bill, and therefore Congress is justified in usurping this constitutional power and prescribing the qualifications of voters from all States.

Now, can any other interpretation be put on this bill?

Mr. HARRIS. Well, as you of course know, article 6 of the Constitution also prescribes that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.

I skipped a few clauses. But that is the essence.

Senator ERVIN. That is true. But the only acts of Congress that are any good are the ones enacted pursuant to the Constitution. And when Congress undertakes to legislate on the qualifications of voters in the face of section 2 of article 1 and the 17th amendment, it is not passing a law pursuant to the Constitution.

Mr. HARRIS. I would think that these laws are in the language of the Constitution appropriate legislation to enforce the provisions of the 14th and 15th amendments. And that, of course, is the question.

Senator ERVIN. Just one other thing. I am sorry I have trespassed so much on your time. But I have enjoyed the discussion with you.

I think this is still the law. I shall read from *Karem v. United States*, which is an opinion written by Associate Justice Lurton of the Supreme Court of the United States while he was still circuit judge. It is reported in 121 Federal Reporter, page 250. He says this:

There are certain very obvious limitations upon the power of Congress to legislate for the enforcement of this article.

He was speaking of the 15th amendment.

First, legislation authorized by the amendment must be addressed to State action in some form or through some agency; second, it must be limited to dealing with discrimination on account of race, color, or condition.

Now—

Mr. HARRIS. He is talking about the 15th amendment there?

Senator ERVIN. Yes. Now, there is not a word—do you have a copy of 2750 before you?

Mr. HARRIS. Yes.

Senator ERVIN. Well, just notice the first part, section 2. It says that any person—I may not have the exact phraseology—acting under the color of law, or otherwise, should do so and so. Now, that “otherwise” would apply to private individuals, would it not?

Mr. HARRIS. Well, I think that this section is a revision of existing provisions of the law—I think, some of the civil rights sections. I think they are worded that way.

Senator ERVIN. That is true.

Mr. HARRIS. I think it has to do with this question. Suppose you have a voter qualification law that is valid on its face, but your election official applies it in a discriminatory fashion to deny Negroes the right to vote. I think that it is not absolutely clear whether he is acting under color of law or otherwise. And I think this language is meant to catch conduct of that sort.

Senator ERVIN. Well, if a man is acting as a State election official, he is acting under color of law, is he not? And therefore his action is State action.

Mr. HARRIS. The Supreme Court eventually held it was State action. The States argued for a while that it was not. That he was outside the law, that it was not State action. But the Court eventually held it was State action.

Senator ERVIN. My point is, what you say is some old phraseology. That is the phraseology of a conspiracy statute. And it was upheld because it applied only to the senatorial and congressional elections, and was in bills which related to the manner of holding elections.

Now, that in my judgment would violate the 15th amendment, because that “otherwise” calls so far as it applies to the action of individuals.

Now, another point—Judge Lurton said of any legislation to enforce the 15th amendment—“it must be limited to dealing with discrimination on account of race, color, or condition.”

Now, there is not a thing in that section of that bill, is there, that deals with discrimination on account of race, color, or condition? It does not even refer to those words.

Mr. HARRIS. The preamble, however, makes it clear that that is one of the concerns of the Congress, and one of the reasons for its passing the substantive provisions—if it does pass them.

Senator ERVIN. Yes.

In other words, it sets out in the preamble, making allegations as to racial discrimination. And then it undertakes to enact operative law which would apply solely to the literacy test, and having no connection whatever, so far as the operative part of the statute is concerned, with race or color.

Mr. HARRIS. Well, it prescribes an objective test, one purpose of which is to prevent the use of these literacy tests to deny the right to vote on account of color.

Senator ERVIN. Well, it would also deal with denial on any other basis, would it not? It deals with the denial of the right to vote on account of failure to meet a State literacy test. Is that not all it deals with in the operative part?

Mr. HARRIS. Yes, I think that is what it deals with.

The question though, is whether this legislation falls within any grant of power to the Congress. The earlier parts of the bill are meant to indicate that Congress finds that the bill is necessary to implement the 14th and 15th amendments.

Senator ERVIN. Well, thank you. I have enjoyed my friendly argument with you.

Mr. CREECH. I would like to go back, if I may, Mr. Chairman, to Mr. Biemiller's statement. I have several questions.

Mr. Biemiller, on page 3, you state the right to vote is a privilege and immunity of citizens of the United States protected by the Constitution. I would like to ask, sir, if you rest your analysis on the basis of the 14th, as well as the 15th, amendment?

Mr. BIEMILLER. I will refer that to Mr. Harris.

Mr. HARRIS. I think so. But I believe that beginning with the *Slaughterhouse* case, the Supreme Court held that the privileges and immunities clause of the 14th amendment has no substantive content. The Court held that privileges and immunities which existed elsewhere could, under that clause, be protected from infringement by the Federal Government, but that this clause did not enlarge the privileges and immunities that existed elsewhere.

Now, as I am sure you know, at times there have been cases which do seem to have found rights under the privileges and immunities clause which might not exist under any other specific provision of the Constitution. But, whatever may be true of the privileges and immunities clause, it is, of course, perfectly clear the equal protection and due process clauses do have substantive content.

The question on which Senator Ervin and I were differing, I think, is whether the Congress has any power to define that content or to decide what is substantively necessary to implement those clauses.

Mr. CREECH. Now, Professor of Law Gittleman, at the University of Denver, stated to the subcommittee that the legislation pending before the subcommittee can rest only tenuously upon the 14th amend-

ment, because, he says, the right to vote is not a privilege or immunity protected by the 14th amendment.

Now, I wonder if you would care to comment upon that assertion.

Mr. HARRIS. Well, I would say that it is much easier to support its validity under the equal protection and due process clauses. These matters we are discussing are of course matters on which lawyers differ, and, in fact, just have. But if I were endeavoring to support their validity in the Supreme Court, I would not look to the privileges and immunities clauses. I would think it easier to support them under these other clauses.

Mr. CREECH. I should like to ask again, with reference to the statement on page 3 to the effect that the right to vote for Federal officers is protected by the Federal Constitution—whether you contend that it is protected once it arises, or that it may be created by congressional action under constitutional authority prior to the time that it ordinarily arises.

Mr. HARRIS. Well, I think that even without the 14th amendment it could properly be protected by the Congress. I think the *Classic* case stands for that—that the Congress has power to protect the right to vote, even though the State has the power to prescribe the qualifications of voters—that once the State has prescribed the qualification, the right to vote is a Federal right, subject to Federal protection.

Mr. CREECH. Of course there we are talking about article 1, section 4. I believe, Congress having the authority to regulate the time, place, and manner of elections.

Mr. HARRIS. Yes.

Mr. CREECH. Which of course we would not confuse with voter qualifications.

Mr. HARRIS. No.

Now, when you come to the voter qualifications question, it seems to me that the reconstruction amendments, and also the 19th, do put substantive restrictions on the power of the State to prescribe qualifications. They also authorize the Congress to enforce their provisions by appropriate legislation. The question which we have been discussing is whether a literacy-test bill is appropriate legislation within the meaning of those enabling sections, or whether the Congress has any power to enact a substantive test as reasonably necessary to protect due process and equal protection, without respect to the right to vote, from denial on account of race, and so on.

I think that it does. That is the way I would read the literal language of the Constitution.

Section 2 of the 14th amendment also seems to me to indicate that Congress was meant by the amendment to get into this field. However, I agree that this particular point has not been squarely passed on by the Court, because Congress has not done exactly this sort of thing before.

Mr. CREECH. Now, sir, to paraphrase what you have just said—I do not want to misconstrue what you said—but am I correct in thinking that it is your view that Congress may legislate regarding the right to vote before this right arises—is that correct?

Mr. HARRIS. Yes—under the 14th, 15th, and 19th amendments.

Mr. CREECH. Now, how, sir, would you say, then, the right arises, this right to vote?

Mr. HARRIS. You mean whence is it derived?

Mr. CREECH. Yes. How does an individual acquire the right to vote?

You say that Congress may legislate.

Mr. HARRIS. I think that he acquires the right to vote under a law passed by the State prescribing qualifications. But that the State law prescribing qualifications has to be valid, that any invalid qualifications in the State law could be disregarded. And I think that Congress has power to define—under the 14th amendment—what qualifications are invalid.

For example, if your law said that only red-haired men who lived in the State for a year could vote, I think a brunette who had lived there a year could go in and would have a right to vote, which would derive from that statute—the provision about redheaded men would be invalid and would be knocked out.

Mr. CREECH. This would be a determination made by the courts that the statute would be unconstitutional on the basis of deprivation of equal protection—and would ipso facto confer upon Congress the authority to legislate in this area: is that correct?

Mr. HARRIS. I think Congress would also have power—the example is admittedly absurd—but I would think Congress would have power to pass a law saying that any State law which undertakes to prescribe voting qualifications according to the color of a man's hair shall be invalid. I would think Congress would have that power.

Mr. CREECH. In *Reese v. The United States*, the Supreme Court said the 15th amendment does not confer the right of suffrage upon anyone. It prevents the States of the United States, however, from giving preference in this particular to one citizen over another on account of race, color or previous condition of servitude.

Now, in the *Lassiter* case, which we have mentioned earlier, which of course was a unanimous decision of the Court, handed down in 1959, the Court said there:

We come to the question whether a State may consistently under the 14th and 15th amendments apply a literacy test to all voters irrespective of race and color. The *Gutnn* case, *supra*, 356, disposed of the question in a few words: "No time need be spent on the question of a validity of the literacy test considered alone since, as we have seen, its establishment was but the exercise by the State of a lawful power vested in it, not subject to our supervision and indeed its validity is admitted."

In this same case, handed down in 1959, by a unanimous Supreme Court decision, the Court said:

Literacy and illiteracy are neutral on race, creed, color and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society, where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to assure an independent and intelligent exercise of the right of suffrage.

We do not sit in judgment on the wisdom of this policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

You mentioned, sir, the *Baker* case, and in that case, in a concurring opinion, handed down last week, Mr. Justice Douglas said:

That the States may specify the qualifications for voters is implicit in article I, section 2, clause 1, which provides that the House of Representatives may be chosen by the people and the electors (voters) in each State shall have the qualifications requisite for electors (voters) of the most numerous branch of the

State legislature. The same provision contained in the 17th amendment governs the election of Senators. Within limits those qualifications may be fixed by State law.

He cites the *Lassiter* case, and then he goes on to say:

Yet as stated in *Ex parte Yarbrough*, those who vote for Members of Congress do not owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively upon the law of the State. The power of Congress to prescribe the qualifications for voters and thus override State law is not at issue here. It is, however, clear that by reason of the demands of the Constitution, there are several qualifications a State may not require—race, color, or previous condition of servitude are impermissible standards by reason of the 15th amendment, and that alone is sufficient to explain *Gomillion v. Lightfoot*.

Now, I wonder, sir, in view of these recent decisions—as you noted the *Baker* decision was just handed down last week, the *Lassiter* case was handed down by a unanimous Court in 1959—how you feel your position comports with these Supreme Court decisions.

Mr. HARRIS. I would say that in the language you read, Mr. Justice Douglas was reserving decision on this very point that we have been discussing. He was saying that they would meet that question when and if they got to it.

Now, if you take—

Mr. CREECH. Excuse me. But he was, of course, citing here a case which the Court was unanimously agreed upon in 1959, and that Court—in that case, the Court went back to the *Guinn* case, it went back to the *Stone* case in Massachusetts.

Mr. HARRIS. I do not think there is any question that the Court has upheld as valid on their faces various State literacy tests. It has also held that they may be invalid as applied. I do not think that either line of decisions reaches the question here, which is whether Congress can impose its own standard with respect to literacy tests on the basis of a finding that these tests have been used arbitrarily and discriminatorily.

Now, suppose you had a State law that said only Ph.D.'s may vote. I would think that such a law as that, simply on its face, would present a question to the Supreme Court, and might well be held invalid as a violation of due process or equal protection.

Certainly I would think that if Congress undertook to pass a law defining due process and equal protection in this field, and to vitiate such a law, that it could do so.

Senator ERVIN. I think we have protection from such a law as that in the State legislatures, because I think a lot of them probably adopt a theory that a lot of Ph.D.'s have been educated way past their intelligence.

Mr. CREECH. Sir, going back to the bills again, S. 2979, of course, goes much farther than either of the other two bills. It would limit voter qualifications to age, residence, legal confinement, and prior conviction of a felony—only on those four bases, would anyone be disfranchised from voting.

Now, this bill would affect some 45 of our 50 States in various ways. As you know, there are some States which disqualify from voting idiots and the insane, who would not be covered by this bill unless they were legally confined. By the same token, there are a number of State statutes and constitutions which contain provisions disqualifying individuals convicted of having committed certain crimes, which

maybe would not qualify under this bill, since I presume they are using the Federal criminal statute as the definition of "felony," which would require 1 year imprisonment or more. Also some States require loyalty oaths. Some disqualify dishonorably discharged servicemen. There are a number of qualifications set by the various States which would be changed by this act.

Now, I wonder, sir, what do you find as the constitutional basis for taking from the States their rights to prescribe voter qualifications, with the exception of those qualifications enumerated in this bill?

Mr. HARRIS. I think it would have to be that Congress could reasonably conclude that exclusion on other grounds was a violation of equal protection or due process, or that limiting voter qualifications to these qualifications was necessary to protect the right to vote from deprivation of equal protection or violation of due process.

It is, of course, easy to think of other rational grounds for denying the right to vote.

I was struck by the fact that section 2 of the 14th amendment proposes to reduce State representation in the House of Representatives for denial of the right to vote on any ground other than participation in rebellion or other crime. It doesn't mention mental incompetence or confinement in an institution, or failure to meet the residence requirements, or any of these other things.

Frankly, I don't know why that omission was made. It certainly would be very peculiar to reduce a State's representation because it denied the right to vote to the insane. But I take it that the authors of the 14th amendment were dealing in broad categories, and that the authors of this bill, S. 2979, are similarly painting with a broad brush, on the theory that experience shows that all sorts of devices will be resorted to to deprive people arbitrarily of the right to vote in violation of the 14th amendment, or by reason of color in violation of the 15th amendment; that only by laying down objective tests can Congress adequately prevent violations of the 14th and 15th amendments; and that this bill undertakes to lay down these tests on the theory that only thus can Congress adequately prevent evasions of the constitutional provisions in the guise of imposing other qualifications which are either applied arbitrarily or are applied as a cover for a racial judgment.

Mr. CREECH. Sir, Mr. Biemiller has indicated in his statement that this area of voting and voting rights has been one which your organization has been very much concerned with over a period of time. Has your investigation led your organization to the conclusion that it is undesirable or that it is unreasonable for the States to disqualify the insane or, for that matter, individuals who might have received dishonorable discharges from the service? Or have you taken any position on these various qualifications which a number of States have?

Mr. HARRIS. No, we have not. But if Congress, as I think it has, has authority under the Constitution to decide what type of substantive requirements are needed to prevent violations of due process and equal protection, the fact that you can think of some other qualifications that might reasonably have been included would not, I think, invalidate the bill.

Mr. CREECH. My question, sir, is: Has your investigation indicated that such a law is desirable?

Mr. HARRIS. I think I said "No" at the outset to that. That is certainly the answer.

Mr. CREECH. Now, sir, you talk about enforcement, and you mention the standards or the tests which might be prescribed.

Is it your feeling, sir, with regard to S. 480 and S. 2750, that by stipulating an individual who has a sixth grade education is literate, that this will avoid any difficulty in enforcement? Do you not foresee that an individual who wanted to keep a person from voting on the basis of literacy or some other qualification might also pose problems with regard to satisfying the requirement of proof of sixth grade education.

Mr. HARRIS. I suppose he might. No law meets every conceivable problem.

Mr. CREECH. But there are laws on the books which prescribe both civil and criminal remedies if a person thinks he is being discriminated against. I am just inquiring what advantage this legislation would provide for an individual.

Mr. HARRIS. It would provide a standard and objective test and would, I think, therefore greatly facilitate his establishing his qualifications to vote. You would still have such problems as the registrar not being there when people show up to register. You would still have the problems of intimidation by private groups, matters to which, as you say, there is other legislation already directed, though it may be debated whether it is adequate or not. The last couple of civil rights acts dealt with that in part.

Mr. CREECH. Is it your feeling then that the protections provided by the existing laws, the recourse to the courts, would be improved upon by this provision, or is it your feeling that the existing laws are inadequate with regard to the actions available to an individual who is denied the right to vote?

Mr. HARRIS. I think the theory of this legislation obviously is that the existing laws are inadequate to protect the right to vote.

Mr. CREECH. Yes. But in your view, is this a decided improvement? Is this going to overcome the obstacles which the proponents of these bills say exist?

Mr. HARRIS. I think it will overcome some of them.

Senator ERVIN. Just one other question. If Congress can say a sixth grade education satisfies the law, why can't you say a first grade or no education at all?

Mr. HARRIS. I think you have a question of reasonableness there, or of arbitrariness.

Senator ERVIN. Well, why could the Congress not say the first grade? Folks learn to read and write in the first grade. Couldn't they just as soon pluck that out of the air—third, second, anything?

Mr. HARRIS. I think it is a question of whether—of the reasonableness of the standard, or, more exactly, of the reasonableness of the conclusion that a sixth grade education is a reasonable standard for literacy, and that the States should not be permitted to impose more stringent ones. They could, of course, apply less stringent ones if they wanted to.

Mr. BIEMILLER. Some do.

Mr. HARRIS. Or none.

Senator ERVIN. In other words, why couldn't Congress say literacy tests are used in seven States to deprive nonwhites of the right to vote, therefore we will just abolish the literacy tests. That would make it easier, wouldn't it?

Mr. HARRIS. Well, I am not at all sure that they could not; and under section 2 of the 14th amendment, Congress, I think, plainly could impose universal suffrage, but only to the extent of implementing it by reducing representation in the House.

Senator ERVIN. Do you seriously think that Congress could abolish all literacy tests in view of the fact we have the *Lassiter* case and the *Williams* case, which say that literacy tests are valid?

Mr. HARRIS. If Congress concluded that literacy tests are used on a substantial scale to violate the 14th amendment, or as a cover for violating the 15th amendment, I think that it could pass a law banning them.

Senator ERVIN. Then it could abolish other qualifications on this same basis.

Mr. HARRIS. I think it could invalidate any qualifications which it could reasonably find were being used to cover violations of the 14th or 15th amendments. If it wanted to knock out a residence test, I think it would have to find that the residence test was in fact being applied in some discriminatory way on a racial ground or some other unreasonable discriminatory ground.

Senator ERVIN. Which is the standard of reasonableness to be used as a basis of determining that?

Mr. HARRIS. I think the Congress conclusion would be accorded substantial weight by the court, but not conclusive weight. Ultimately, it would apply its own standard, but leaving considerable discretion to the Congress.

Senator ERVIN. I am sorry to detain you so long.

Do you have any questions?

Mr. WATERS. I have a few questions, Mr. Chairman. Mr. Harris, I will address these questions to you, if I may. With respect to the sixth grade of education, it is your opinion, is it not, and the opinion of the AFL-CIO that the Bureau of the Census has deemed the completion of 5 years of primary schooling the functional test of literacy, and it so indicated in its 1960 report, and that is the basis for your conclusion that sixth grade of primary school education would come within the purview of the literacy test?

Mr. BIEMILLER. Yes, I think that is a reasonable conclusion. I think this in part is based upon the fact that the overwhelming number of people in the United States have had that many years of schooling, and that this is about where the minimum level of literacy falls for voting purposes.

I am willing to concede, with my good friend, the chairman, there is a certain arbitrariness in it. By that I mean that whatever you set is going to be an arbitrary thing, but this, in our opinion, does represent a minimum level of literacy.

Mr. WATERS. And it is the opinion of your organization that the bill as proposed does not abolish literacy tests—it merely sets what has been termed by your counsel as an objective standard.

Mr. BIEMILLER. That is correct.

Mr. WATERS. And with respect to the part of the bill which touches on the Spanish language, the reason you approve that is because Spanish is taught in Federal schools in Puerto Rico to American citizens. They are not exposed to any other language, and that is the language in which they are taught; is that correct?

Mr. BIEMILLER. That is correct.

Mr. WATERS. As far as literacy is concerned, there are a great many people who are considered illiterate who are not lacking in political knowledge, who by reason of the advent of electronic communications and radio and TV are quite aware of what is going on in the world; isn't that correct?

Mr. BIEMILLER. Very true.

Mr. WATERS. Do you believe that Congress should have a right to regulate and control the elections of its own Members?

Mr. HARRIS. It does, of course, have a certain residual power in that each House is the absolute judge of whom to seat.

Mr. WATERS. In other words, the activities of the Federal Government will not be curtailed by State action; is that correct?

Mr. HARRIS. I think that is true. If the Congress has the power to legislate, if its legislation is valid, it overrides any State action in the field.

Mr. WATERS. And the basis for the comment in this bill on the literacy tests are the findings by the Civil Rights Commission and the highest enforcement officer of the country, the Attorney General of the United States, has asserted that the literacy tests are used as a cover to deny the right to vote to the individuals by color.

Mr. BIEMILLER. That is the reason we are appearing. In our opinion it is a fact that has been established that the literacy tests in certain States are used primarily as a cover for denying Negroes the right to vote. I don't know why we have to beat about the bush on it, or try to pretend it is anything else.

I have just been in Louisiana. It is true that there is a Supreme Court decision upholding the Louisiana law. But if you go down there, for just about 2 days, and talk to people, you will find out what is going on. Negroes are being eliminated willy-nilly from the registration lists. Negroes who have voted for years are being eliminated. This is the evil that we are trying to get at.

Our State federation of labor, at its convention this week, has made the effort to straighten out this unfair method of knocking voters who have voted for many years off the rolls its No. 1 issue.

Mr. WATERS. Just one other point in connection with the assertion that the legislation is defective because it affects literacy tests which have never been used for racial purposes, as well as those which have. It is clear, is it not, from the Fair Labor Standards Act, the National Labor Relations Act, the Federal Power Act, the Corrupt Practices Act and other Federal legislation, that Congress does possess power to enact legislation pursuant to a granted power, even though it may affect persons outside the scope of direct Federal control.

Mr. HARRIS. I would certainly think so. It seems to me that nearly all legislation involves some element of that.

Mr. WATERS. Thank you, gentlemen. Thank you very much, Mr. Chairman.

Senator ERVIN. That is all.

Mr. HARRIS. I don't think you and I disagree too much on fundamentals. I think we disagree on the question of what is appropriate legislation. I think it boils down to that.

My position is the Constitution defines all of these matters. Under section 2 of article I, in the 17th amendment, the States have an undoubted right to prescribe the qualifications of voters in the most numerous branch of the State legislature. These two sections make those qualifications the qualifications of voters for Senators and Congressmen, and the only limitations are imposed by the 15th, 14th and 19th amendments. And we have to stick to those things, rather than chase the questions of reasonableness, because a lot of people think I am a very unreasonable person, and I disagree with those most emphatically.

Mr. CREECH. Mr. Chairman, the next witness is Hon. Sherwood W. Wise, president of the Mississippi State Bar. Mr. Wise.

Mr. LIPSCOMB. Mr. Chairman, Senator Eastland has asked me to express his regrets that he is tied up in a meeting of the full Committee on Agriculture and Forestry, and cannot be here at this time, and has asked that I present to you the Honorable Sherwood Wise, of Jackson, Miss., president of the Mississippi Bar.

Senator ERVIN. Mr. Wise, we are glad to have you with us.

STATEMENT OF HON. SHERWOOD W. WISE, PRESIDENT OF THE MISSISSIPPI STATE BAR

Mr. WISE. Thank you, Senator, happy to be here. Shall I just proceed?

Senator ERVIN. Proceed.

Mr. WISE. Senator, I have a prepared statement. I assume you would like to have that read.

Senator ERVIN. You can either read it or you can summarize it, and we will put the whole thing in the record, whichever way you want.

Mr. WISE. I could very easily summarize it, I think, without the necessity of reading it.

Senator ERVIN. We will put the entire statement in the record at this point, and then allow you to summarize it as you see fit.

(The complete statement of Mr. Wise follows:)

STATEMENT MADE BEFORE THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE, COMMITTEE ON THE JUDICIARY, U.S. SENATE

My name is Sherwood W. Wise. I am an attorney at law and have practiced in Jackson, Miss., since 1934. I appear here as president of the Mississippi State Bar. My purpose is to discuss S. 480, S. 2750, and S. 2979.

It is my opinion that these bills, if enacted, would violate fundamental constitutional provisions.

APPLICABLE SECTIONS OF CONSTITUTION OF THE UNITED STATES

Article I, Section 2

"1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Amendment XVII

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

"When vacancies happen, in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

(NOTE.—Adopted subsequent to XIV—XV amendments.)

Article V

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article: and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Compare 16 C.J.S. Constitution Law, page 28, section 6, U.S. Constitution.

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

POWER TO PRESCRIBE VOTER QUALIFICATIONS IS DELEGATED TO STATES UNDER
ARTICLES I AND II OF THE U.S. CONSTITUTION

I. History.

Minor v. Happersett, 21 Wall. 162, 21 L. Ed. 627: "When the Constitution of the United States was adopted, all the several States, with the exception of Rhode Island had Constitutions of their own. Rhode Island continued to act under its charter from the Crown. Upon an examination of those Constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, 'Every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request,' were its voters; in Massachusetts 'Every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds'; in Rhode Island 'Such as are admitted free of the company and society' of the Colony; in Connecticut such persons as had 'Maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate,' if so certified by the selectmen; in New York 'Every male inhabitant of full age who shall have personally resided with one of the counties of the State for six months immediately preceding the day of election * * * if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State'; in New Jersey 'All inhabitants * * * of full age who are worth fifty pounds, proclamation money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election'; in Pennsylvania 'Every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election'; in Delaware and Virginia 'as exercised by law at present'; in Maryland 'All freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above

the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election'; in North Carolina, for Senators, 'All freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election,' and for members of the House of Commons 'All freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes'; in South Carolina 'Every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot on which he had been legally seised and possessed at least six months before such election, or (not having such freehold or town lot) hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government'; and in Georgia 'Such citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county.'

"In this condition of the law in respect to suffrage in the several states, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, *the framers of the Constitution would not have left it to implication*. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

"But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By article 4, section 2, it provided that 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It does to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think has never been claimed. And again, by the very terms of the Amendment we have been considering (the fourteenth), 'Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.' Why this, if it was not in the power of the Legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, 'persons.' They are counted in the enumeration upon which the appropriation is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated, if suffrage was the absolute right of all citizens.

"And still again; after the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude.' The Fourteenth Amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. *If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc.?* Nothing is more evident than that the greater must include the less, and if all were already protected, why go through the form of amending the Constitution to protect a part?"

"Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle the construction of so important an instrument as the Constitution of the United States, confessedly, it most certainly has been done here. Our province is to decide what the law is, not to declare what it should be.

"We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may, perhaps, be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we can find it is within the power of a State to withhold.

"Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the Constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we affirm the judgment of the court below."

2. Controlling decisions.

Lasater v. Northampton County Board of Elections, 360 U.S. 45, 3 L. Ed. 2d 1072, 1077:

"While section 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.'"

Darby v. Daniel, 168 F.S. 170:

"Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States. The Supreme Court has spoken on the subject in language as clear as it is decisive. Witness, for example, what it said in *Pope v. Williams*, 1904, 193 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 815:

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper * * *. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, (supra) such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state, as far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but nativeborn citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; * * *. The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. * * *

"* * * The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." 193 U.S. at pages 632-634, 24 S. Ct. at page 575.

"Like language was used by the Court in a case so much relied upon by plaintiffs, *Guinn v. United States*, 1915, 283 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340. In striking down the Grandfather Clause of the Oklahoma Constitution, O.S.

1951 Const. art. 3, section 4a the Court fixed its eyes upon certain principles as the lodestar which should furnish the light by which it would be guided:

"* * * It (the United States) says state power to provide for suffrage is not disputed, although, of course, the authority of the 15th Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a state to exert judgment and discretion in fixing the qualification of suffrage is advanced, and no right to question the motive of the state in establishing a standard as to such subjects under such circumstances or to review or supervise the same, is relied upon and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand, the argument of the government in substance says: No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment, and therefore cannot be here assailed either by disregarding the state's power to judge on the subject, or by testing its motive in enacting the provision.' 238 U.S. at pages 359-360, 35 S. Ct. at page 929.

* * * * *

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and *without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be with support*, and both the authority of the nation and the State would fall to the ground. *In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.* 238 U.S. at page 362, 35 S. Ct. at page 930.

"In considering whether amended Section 244 is unconstitutional on its face, it is important to bear in mind that plaintiffs concede that the voting provisions of the Constitution of 1890 were valid. They could not, of course, do less because the Supreme Court of the United States specifically approved them in *Williams v. State of Mississippi*, 1898, 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012."

"Sections 241, 242, and 244 of the Constitution of 1890 were attacked by motion (20 So. at p. 840) as being violative of the due process and equal protection clauses of the fourteenth amendment. The motion was grounded on the allegation that the constitutional convention of Mississippi was composed of 134 members, of which only 1 was a Negro; 'that the purpose and object of said constitution was to disqualify by reason of their color, race and previous condition of servitude, 190,000 Negro voters.' It was contended before the Supreme Court, 170 U.S. at page 215, 18 S. Ct. at page 584, that, 'under prior laws there were 190,000 colored voters and 69,000 white voters;' and 'that sections 241, 242, and 244 of the constitution of this state are in conflict with the fourteenth amendment to the constitution of the United States, because they vest in administrative officers the power to discriminate against citizens by reason of their color; and that the purpose of so investing such officers with such power was intended by the framers of the state constitution, to the end that it should be used to discriminate against the negroes of the state.' The contentions there made bear a marked resemblance to those now made before us. Responding to them the Supreme Court of Mississippi said (20 So. 840-841):

"At this point in the investigation it is sufficient to say that we have no power to investigate or decide upon the private, individual purposes of those who framed the constitution, the political or social complexion of the body of the convention * * *. We can deal only with the perfected work—the written constitution adopted and put in operation by the convention. * * *

"We find nothing in the constitutional provisions challenged by the appellant which discriminate against any citizen by reason of his race, color, or previous conditions of servitude. * * * *All these provisions, if fairly and impartially administered, apply with equal force to the individual white and negro citizen.* It may be, and unquestionably is true that, so administered, their operation will be to exclude from the exercise of the elective franchise a greater proportionate number of colored than of white persons. But this is not because one is white and the other is colored, but, because of superior advantages and circumstances possessed by the one race over the other, a greater number

of the more fortunate race is found to possess the qualifications which the framers of the constitution deemed essential for the exercise of the elective franchise.'

"* * * At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the government of this country and of the states.

"(b) Literacy tests for prospective voters have been in effect in this country for a century, and no case has been brought before us holding that the people of a state have placed themselves under too heavy a burden in setting the standards which will earn the right to vote, and none condemning a literacy test as such. In *Lassiter v. Taylor*, U.S.D.C.E.D.N. Car. 1957, 152 F. Supp. 295, 297-298, attention is called to the fact that nineteen states, only seven of which are Southern states, prescribe literacy tests, and those states and the laws prescribing the literacy tests are listed. Plaintiffs concede that it is proper for Mississippi to enact reasonable literacy requirements for voting. That concession is bound to include the unquestioned concept that it is the states which have plenary and exclusive power to determine what is reasonable. See the language of the Supreme Court opinions in part I *supra*. Plaintiff's idea that a literacy test may properly embrace one facet but not two (or two facets but not three) is without sanction of either law or reason. In *Trudeau v. Barnes*, 5 Cir., 65 F. 2d 563, certiorari denied 200 U.S. 650, 54 S. Ct. 74, 78 L.Ed. 571, the Fifth Circuit Court of Appeals approved Louisiana constitutional requirements embracing both reading and interpreting its Constitution and that of the United States."

Ray v. Blair, 343 U.S. 214, 96 L. Ed. 804, 901:

"* * * The presidential electors exercise a federal function in balloting for President and Vice President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the federal constitution."

Lassiter v. Northampton County Board of Elections, (*supra*):

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347, 33 L. Ed. 637, 641, 10 S. Ct. 299) are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. *Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show*. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. Cf. *Franklin v. Harper*, 205 Ga. 779, 55 S.E. 2d 221, app. dism'd 339 U.S. 946, 94 L. Ed. 1361, 70 S. Ct. 804. It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone v. Smith*, 159 Mass. 413, 414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

"Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis v. Schnell*, 81 F. Supp. 872, aff'd. 336 U.S. 933, 93 L. Ed. 1093, 69 S. Ct. 749, the test was the citizen's ability to 'understand and explain' an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot."

DUAL SYSTEM OF GOVERNMENT

Texas v. White, 74 U.S. 700, 19 L. Ed. 227, 237:

"* * * The constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

South Carolina v. United States, 199 U.S. 261, 50 L. Ed. 261, 264:

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this republic a dual system of government—national and state—each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the national government has absolute control, and no action of the state can interfere therewith, and there are others in which the state is supreme, and in respect to them the national government is powerless. To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all courts; pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

New York v. United States, 326 U.S. 572, 90 L. Ed. 326.

Detroit v. Murray Corporation, 355 U.S. 495, 2 L. Ed. 2d 460, dissenting opinion of Mr. Justice Frankfurter:

"Adjustment of the interpenetrating factors involved in the Nation-State relation of our federal system, insofar as they are amenable to adjudication, is a subtle and complicated process. It precludes easy application even of accepted legal formulas. Particularly is this true when the taxing power of the States is asserted against claims of intrusion into areas reserved to the Nation. * * * The necessity for judicial accommodation between the intersecting interests of the States' power to tax and the concerns of the Nation in carrying on its government presents problems solutions for which cannot be sought by a formula assuring a bright, straight line of decisions. Accordingly, we have been admonished in the leading modern case dealing with these problems that they require 'the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system.' *James v. Dravo Contracting Co.*, 302 U.S. 134, 150, 82 L. ed 155, 167, 58 S. Ct. 208, 114 A.L.R. 318."

Chicago, Milwaukee, St. Paul & P.R. Co. v. Illinois, 355 U.S. 300, 2 L. Ed. 2d 292, 297:

"This case presents once again the problem of adjusting state and federal interests in the regulation of intrastate rates. These intrastate rates are primarily the State's concern and federal power is dominant 'only so far as necessary to alter rates which injuriously affect interstate transportation.' *North Carolina v. United States*, 325 U.S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260. Thus, whenever this federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must 'clearly appear.' *Florida v. United States*, 282 U.S. 194, 212, 75 L. Ed. 291, 302, 51 S. Ct. 119. * * *"

The power to establish the State constitution is vested exclusively in the State subject, in case the State should thereby exceed the authority in it vested, to having the excess excised by the Supreme Court under the supremacy clause.

Having in mind the cases cited supra, we have here an interposition by Congress to assume to set up a rule of construction in a matter wherein plenary power is in the State, subject to revision, if erroneous, by the Supreme Court. How far Congress could attempt to vest by its declarations jurisdiction in administrative officers as to the meaning of State constitutional provisions is a question whereto there should be no doubt. The assertion of such a power is revolutionary. Without power to enact, change, or alter, Congress seeks to subvert by declaring that those who have acted within the scope of their authority, subject to review only by the Supreme Court of the United States, are now to be compelled to obey, under legislative mandate, an interpretation of that whereover plenary power is vested elsewhere. *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 60 L. Ed. 679; 11 Am. Jur., "Constitutional Law," section 206, page 908.

These statutes passed as to a matter resting exclusively within the State sovereignty are not in any way binding upon the State court when, under the Constitution vesting exclusive powers as to executive, legislative, and judicial, the Congress assumes to say certain facts which may or may not be true. It is well settled that the primary duty of determining the intention of the State constitution is a matter for the supreme court of that State; and when and if the State court has not passed upon that interpretation, the Supreme Court, in its

position as the expositor of the law, returns the record to the State supreme court so that the State supreme court may advise the Federal Supreme Court what judicial interpretation shall be had when the Supreme Court of the United States attempts to apply the Federal Constitution. The State's decision interpreting its own constitution is a fundamental portion of that whereto the adjudication may be had. In *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L. Ed. 2d 562, Syl. 2, it was held:

"In a case involving the validity, under the state and federal constitutions, of a state law, where the state law problems are delicate ones and a state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, a federal court should hold its hand, lest it render a constitutional decision unnecessarily; hence, on appeal from a judgment of a Federal Court of Appeals affirming a District Court's judgment holding that a state statute imposing a charge on public utilities for the use of public streets and places violated the state and federal constitutions, the United States Supreme Court will vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold the cause while the parties repair to a state tribunal for an authoritative declaration of applicable state law."

Sp. United States v. Public Utilities Commission of California, 345 U.S. 295, 97 L. Ed. 1020. In *Garner v. Louisiana*, — U.S. —, 7 L. Ed., 2d 207, 215, 229, 232, the Supreme Court said:

"We of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court. * * *"

Mr. Justice Frankfurter concurring, p. 229, 232:

"* * * If there be doubt as to how the statute was construed in this respect, the cases should be returned to the Louisiana Supreme Court for clarification of its judgments." See *Herb v. Pitcairn*, 324 U.S. 117, 89 L. Ed. 789, 65 S. Ct. 450.

* * * * *

"Indeed, the fact of which I think we must consider judicial notice was taken in this instance was so notorious throughout the country that far from its being unconstitutional for a court to take it into consideration, it would be quite amiss for us not to deem that the Louisiana courts did so on their own initiative. See, e.g., Uniform Rule of Evidence 9(1); cf. Note, 12 Va. L. Rev. 154 (1925), and cases there cited. It might have been procedurally preferable had the trial judge announced to the parties that he was taking judicial notice, as is suggested in Model Code of Evidence, Rule 804. But we would be exalting the sheerest of technicalities were we to hold that a conviction is constitutionally void because of a judge's failure to declare that he has noticed a common proposition when, at no stage in the proceedings, is it suggested that the proposition may be untrue. Whether a trial judge need notify the parties of his intention to take judicial notice of 'routine matters of common knowledge which * * * (he) would notice as a matter of course' is best left to his 'reasonable discretion.' McCormick, Evidence (1954), 708. Appellate courts have always reserved the authority to notice such commonly known propositions as are needed to support the judgment of a lower court, even if no express reference has been made below. See Comment, 43 Mich. L. Rev. 509, 512, 513 (1943)."

These matters can be integrated into the Constitution by amendment and this is the sole method whereby that which is State law may be effectively controlled.

It is strongly questioned whether a declaration of Congress that a statute should be construed in a specific way would be judicially noticed at all, for construction is for the courts, legislation for Congress. What would be the position taken as to such a statute in the State of Mississippi would depend primarily upon what effect its court should deem proper, subject only to review by the Supreme Court if there were a constitutional contravention, not a statutory misinterpretation.

Compare the relative powers of the United States and the States in *Collins v. Yosemite Park & Co.*, 304 U.S. 518, 82 L. Ed. 1502. The acquisition by the United States of a separate national existence, independently of the States with destruction of State sovereignty, is something which, with deference, cannot be admitted.

CONSIDERATION OF S. 480, S. 2750 AND S. 2979

At the outset I express the opinion that these bills are violative of the Constitution of the United States. I submit that the authorities cited above sufficiently substantiate this opinion.

These bills propose to substitute a sixth grade education for present literacy tests. I submit that this suggested criteria is no criteria at all. It would, in my opinion, effectively eliminate the literacy tests for voting. There is no standard sixth grade education in this country. Moreover, the completion of six grades does not necessarily insure literacy. It has, in truth and in fact, no meaning as it is proposed to be used. It would, by effectively elementing literacy qualifications as adopted by the States, violate the constitutional rights set out above.

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."—(Lewis Carroll, "Through the Looking Glass.")

Mr. WISE. Senator, the thesis of this statement simply is that S. 2750, S. 2979, and S. 480, if enacted into law would violate provisions of the Constitution of the United States—very particularly article I, section 2, which of course applies to the House of Representatives, the 17th amendment, which applies to the U.S. Senate.

We point out that the 17th amendment was of course adopted subsequent to the 14th and 15th amendments. Also, as one of the pertinent provisions, we would like to call to the attention of the subcommittee, article V of the Constitution, which prescribes in our opinion the proper way to deal with this matter, if indeed it needs to be dealt with at all, which we do not think it does.

We also point out the 10th amendment, which of course reserves to the States all powers not prohibited to them, nor delegated to the United States. I think this case of *Minor v. Happersett*, which I had quoted in great detail, gives a very concise history of this particular constitutional problem. I won't necessarily go into that, because I know that this subcommittee is well acquainted with it.

It goes on particularly to point out, however, that suffrage is not a privilege in and of itself, under the Constitution. Otherwise there would have been no reason to pass the 14th and 15th amendments.

We cite a number of decisions that control here. First, *Lassiter v. Northampton County Board of Elections*, which points out that the rights protected by the 14th amendment refer to the right to vote as established by the laws and constitution of the State. In other words, the right must first be established in a constitutional manner by the State itself before the protection afforded by the 14th amendment comes into play.

Darby v. Daniel is a very important case which discusses in great detail this problem and goes on to say—I will quote just briefly, if I may—

Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rests would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment recognizes the possession of the general power by the State since the amendment seeks to regulate its exercise as to the particular subject with which it deals.

And it goes on I think to make a very pertinent observation, a general observation.

At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the Government of this country and of the States.

I would like to point out some language from *Lassiter v. Northampton County* which I refer to again, to the effect that literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world will show. "Literacy and intelligence are obviously not synonymous," and so forth. I think counsel read possibly some of that in connection with his interrogation of the former witness. And I think that is very pertinent.

Then we bring out the proposition, of course, that we operate under a dual system of government, and in the case of *Texas v. White*, it was stated that the Constitution and all its provisions look to an indestructible Union, composed of indestructible States. Personally, I think that is very fundamental. And a discussion here with reference to the right of a State first to interpret its own laws and its own constitution before the Federal courts will even pass upon the constitutionality of such provisions. In one particular instance, in Mississippi, a case was sent back by the Supreme Court of the United States, so that the highest court of the State might first say what was meant by its laws before it would make a decision with reference to the constitutionality of the particular provision.

Then, in the final consideration of these three particular bills, it appears to me that this imposition of a sixth grade education is virtually without meaning. There could not possibly be any uniformity over the country as a whole, or from State to State, or from county to county, or possibly even from school to school, with reference to a sixth grade education.

Now, I realize that this is something that the Bureau of the Census has taken arbitrarily. But I don't think it is any justification for taking it arbitrarily in this case, that it has already been so done.

I don't personally believe that this has any meaning. I think it is no criteria. I think in effect it has taken from the States any literacy qualification whatsoever, when you prescribe something as nebulous as this is.

I have a little quotation at the end which I think possibly is pertinent here. It is from one of my favorite authors, Lewis Carroll, from "Through the Looking Glass."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that is all."

I personally feel that in this instance the Constitution of the United States is very definite and clearly stated that the States are to be master of this particular proposition—that is, who is qualified to vote. And I think if Congress were to enact this legislation, that it would be doing an unconstitutional thing, and would be invading the province of the States.

To me, when you get down to the fundamentals of it, and to the great importance of it, this is the thing.

Senator ERVIN. The fundamental question here, I think, is suggested by the quotation you have from *Texas v. White*. The question is whether we are going to continue to have an indestructible Union composed of indestructible States, or whether the Federal Government is going to destroy the States for the purpose of centralizing all Government powers in Washington.

Mr. WISE. I don't think there is any question about that, Senator. And I think this is just another example of that effort. I think to many, many people who will never come before your subcommittee this is a most alarming thing—to many people all over these United States, not in any particular section. And certainly I think to the vast majority of lawyers, I do believe, whenever they may reside, that this is a thing that is frightening to them at this time.

Senator ERVIN. I witnessed in 1960 something I thought no legislative body in the United States would ever do.

With the avowed purpose, among other things, of enforcing the 14th amendment, as well as the 15th, the Congress of the United States actually enacted a provision in the so-called Civil Rights Act of 1960, under which the testimony of an applicant for the right to vote would be taken by a voting referee, in the absence of the other parties to the litigation. This, it seems to me, is on a par with the star chamber proceedings in England. Then after the testimony is taken, in the absence of the adverse party, the act specifies that that is the only evidence that can be considered in passing upon the question of the man's capacity to meet a literacy test.

In other words, here is the Congress of the United States, whose Members are sworn to uphold the Constitution which guarantees due process of law, actually enacting into law a bill in which the evidence in the case is to be taken in the absence of an adverse party who has no right to confront his adversary, and is to be the only evidence the court can consider in passing on a constitutional question; namely, whether the man meets the qualifications to vote prescribed by the 2d section of the 1st article, and the 17th amendment.

Mr. WISE. Yes, sir; I agree with the Senator. That certainly goes back to the very darkest part of some of the history of the Anglo-Saxon race. We have overcome that many years ago, and it is certainly alarming to see us reverting to the loss of liberties which have been gained at so great a price.

Senator ERVIN. I would like to ask you this question, with reference to section 2 of article I applying to congressional elections, and the 17th amendment applying to senatorial elections.

Do you think it would have been possible for the people who drafted and ratified the Constitution to have used clearer language to say that the only people who are eligible to vote for Senators and Representatives in the House are those persons who possess the qualifications prescribed by State law for electors for the most numerous branch of the State legislature?

Mr. WISE. I don't know how they could have done it any more clearly, Senator.

Senator ERVIN. And do not these bills constitute a direct attempt to nullify the provisions of the 2d section of the 1st article of the Constitution, and of the 17th amendment?

Mr. WISE. I don't see how they could otherwise be interpreted—under the clear language of the Constitution itself, and the decisions which have been handed down thereunder.

Senator ERVIN. Now, is it not a fact that the literacy test prescribed in North Carolina, and the literacy test prescribed by Mississippi, and the literacy test prescribed by Louisiana, have been held to be perfectly valid enactments by those States, meeting all the requirements of the Constitution?

Mr. WISE. Yes, sir; they have. The Mississippi statute has been so held very recently.

Senator ERVIN. Now, when all is said and done, don't these bills come down to this: That although the Federal courts, which alone possess the judicial power of the United States, have declared literacy tests of three Southern States to conform to the Federal Constitution, nevertheless, in enacting these bills Congress would undertake to say that the literacy tests, not only of these three States, but of all the other States with such tests, are arbitrary, unreasonable, and unconstitutional?

Mr. WISE. I don't think there is any question about it, sir.

Senator ERVIN. What power does the Congress of the United States have to exercise judicial power?

Mr. WISE. None, that I have ever been able to find, sir.

Senator ERVIN. Has it not been held under the first article of the Constitution that the judicial power of the United States is the power to determine the meaning and the application of constitutional provisions and of statutes enacted by Congress?

Mr. WISE. Unquestionably.

Senator ERVIN. Do you agree with me in the observation that these whereases and preambles of the bill constitute an attempt on the part of Congress to usurp and exercise the judicial power?

Mr. WISE. I don't think there is any question about it. I think they are red herring pronouncements, without any question.

Senator ERVIN. Do you agree with me that the Supreme Court has held that Congress has no power to legislate with respect to State and local elections, except under the 15th and the 19th amendments, and that the power of those two amendments is restricted to the provision of discrimination on the basis of race and sex?

Mr. WISE. That is correct, yes. And once the criteria has been established by the States, then they cannot discriminate, because of the elements which you mentioned. But only then do they come into play.

Senator ERVIN. Has not the Supreme Court held in several cases that the right to impose a poll tax belongs to a State under this power to describe qualifications for voters, and has not the Senate just manifested its conviction that the only proper way to attempt to do away with the poll taxes as a prerequisite to voting is a constitutional amendment?

Mr. WISE. They have certainly recognized that fact by the recent actions in Congress.

Senator ERVIN. I will ask you if the Constitution has not been uniformly interpreted to say that the States have the power, in effect, to prescribe the qualifications for voters for Senators and Congressmen, under section 2 of article I in the 17th amendment, and that the power of the Congress over congressional elections that it possesses

only under section 4 of article I, to regulate the times and places and manners of holding elections, is subject to the provisions preventing discrimination?

Mr. WISE. Yes, sir, that is undoubtedly true. And of course that latter provision has no application to the question before us at this time.

Senator ERVIN. So when we throw away all of the whereases and the other camouflage which is in the preamble to these bills, we have in these bills an effort on the part of Congress, to usurp and exercise a power vested, in as clear English as could be found, in the States by the U.S. Constitution.

Mr. WISE. I don't see how it could be any clearer. I do not.

Senator ERVIN. Do you agree with me that one of the most tragic things in our national life today is the fact that some groups and organizations, and some individuals, find it so enjoyable emotionally or financially profitable, or politically advantageous to make whipping boys out of the South that they have even gone to the point where they are willing to destroy the Constitution which was created for the protection of all Americans of all races in all generations?

Mr. WISE. I think they demonstrate that time and time again, Senator, and I think that is tragic for all the citizens of this country, including those that they purport to represent.

Senator ERVIN. Excuse me for being so frank. But I think there is no protection to be found for any American outside of the protection accorded to them by the written Constitution. There is no other way to protect the American people against governmental tyranny.

Mr. WISE. If they insist on pulling down the house, they are going to pull it down on themselves and us, too, I think.

Senator ERVIN. You cited here what I think is one of the great decisions of the Supreme Court of the United States, the case of *South Carolina v. The United States*, in which the court said that the men who drafted the U.S. Constitution were not mere visionaries, but were practical men, and that they were describing in the Constitution the kinds of government they were creating and the powers which it was to take.

Mr. WISE. Unquestionably. And certainly the principles which were good then are equally good today and should not be destroyed.

Mr. CREECH. Mr. Wise, S. 2979 would change the voting laws of some 45 States. It limits disqualification of voters to four things: residence, age, legal confinement, and conviction of a felony. With the exception of those four specifications, there would be no voter qualifications that the State might set. In the case of your State, and in the instance of some 44 other States, your voter qualifications would be changed. For instance, in Mississippi you would no longer be able to refuse the right to idiots and insane persons unless they were confined. I wonder, sir, if you would care to comment on these provisions of S. 2979, and state where in the Constitution such power is granted to Congress to enact this type of legislation.

Mr. WISE. I don't think, sir, that that is provided. I think it is unquestionably violative of the particular sections which we have been discussing. And I think to deprive the State of Mississippi of its right to add these additional reasonable qualifications is certainly an invasion of its constitutional rights.

Mr. CREECH. I presume, sir, you feel, that by the same token, this would be an invasion of the rights of those States which might require loyalty oaths or disqualify dishonorably discharged servicemen from voting.

Mr. WISE. Unquestionably. I think in my own mind those are reasonable provisions, and if a State chooses to incorporate its qualifications in its voting laws, I think certainly under the Constitution it is clearly entitled to do so.

Mr. CREECH. Sir, several proponents of S. 480, S. 2750, and S. 2979, stated that, although the Supreme Court has allowed literacy tests to stand in the *Guinn* and *Lassiter* cases, the Court has not passed upon the power of Congress to regulate literacy tests by finding such tests are being used to discriminate.

These witnesses maintain the *Lassiter* case and the others are irrelevant, and that these bills can be sustained under the enforcement clauses of the 14th and 15th amendments. I wonder, sir, if you would like to comment on that argument.

Mr. WISE. It seems to me that these authorities which we have already discussed clearly say that the 14th and 15th amendments do not in and of themselves apply to voter qualifications, except and unless the States themselves have established the voter qualifications, and then and only then do the 14th and 15th amendments come into play, as I understand the decisions of the courts. So I don't think this is a proper argument. I don't think it is a sound argument to say that—I think it is a play on words. I think these cases have already clearly pointed the way in those instances.

Mr. CREECH. Sir, in the *Lassiter* case, the Supreme Court of the United States stated that—

While the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of State standards which are not discriminatory, and which do not contravene any restriction which Congress, acting pursuant to its constitutional power, has imposed.

Now, at least one witness has taken the position that this statement from the *Lassiter* case indicates that Congress has constitutional authority to pass any one of these bills. I wonder, sir, if you would care to comment upon that assertion.

Mr. WISE. I don't think under any stretch of the imagination that that language could justify these bills. I think that language points to just what I had said a moment ago, and that is all it says—that voter qualifications must first be set by the States. And that is the State's constitutional privilege to do just that. To me, when you say we are not abolishing it, we are just setting up some standards, or we are not changing it, we are just manipulating it a little bit here, I think when they invade that field at all, they are getting beyond their constitutional rights.

Senator ERVIN. That is a rather strange statement to make, because in most of the States which have literacy tests, the literacy test depends upon the ability to read or write or speak the English language.

Mr. WISE. That is North Carolina, I believe. •

Senator ERVIN. That is the general rule in all of them, I think, with the exception of Hawaii where applicants can speak either English or Hawaiian, and, perhaps, New Mexico and Louisiana.

Yet these bills would not only outlaw the requirements of these literacy tests which make the capacity to use English the criterion, but they would prevent all the other States which have no literacy tests, from ever establishing a literacy test based on the capacity to speak, read, or write English.

Mr. WISE. Unquestionably.

Mr. CREECH. Sir, S. 2750 seems to rely for its constitutionality upon article I, section 4, of the Constitution. This bill is limited to Federal elections, as you know.

Mr. WISE. Yes, sir.

Mr. CREECH. The Attorney General, in a statement on the companion bill before the House Judiciary Committee, said recently that the broad inherent power of Congress to govern the elective process was the basis for supporting this bill.

Would you care to comment upon the extent of congressional power under article I, section 4, to legislate voter qualifications?

Mr. WISE. Article I, section 4, as I recall, is the one that deals with the time and place of elections. Am I correct?

Mr. CREECH. Yes.

Mr. WISE. As I understand that, it just deals with when, how, and so forth, elections may be held. It doesn't go into qualifications at all. And I believe the courts have so held. It has no application to voter qualifications whatsoever. It just deals specifically with the things specifically mentioned in the article, as I recall it. I believe that has been held by the courts. So certainly the provisions of these proposed bills would go far beyond the provisions of that particular article in that they go beyond the question of where, how, and when, and so forth, and under what conditions elections are held, and prescribe who shall vote, which is not contemplated under that provision at all.

Mr. CREECH. Sir, the subcommittee has received a great deal of information about the desirability of setting completion of the sixth grade of primary school as a reasonable standard for determining intelligence and education. In view of the complexity of many of the political issues which face voters today, and in view of the fact there are schools for mentally retarded children which have six or more grades accredited by the various States, do you feel this standard is necessarily reasonable?

Mr. WISE. Sir, in my statement, I think I went beyond stating that it is not reasonable, and went so far as to say that in my opinion it is no standard at all in view of the very things which you mention, and in view of the difference in people, and the difference in capacity to learn, and the difference of school to school, and so forth and so on. I don't think literacy can be measured by numbers, or by anything as artificial as this is. I think literacy is beyond that. It either is or it is not. I don't think you can set up a standard of this kind for it.

Mr. CREECH. Do you feel, sir that such bills, if enacted, would provide the individual a greater protection with regard to the right to vote than he now has under the existing Federal laws?

Mr. WISE. I do not. I think the existing laws go to an amazing extent already. And I don't think that this would add anything to it. But at the same time it would be invading the constitutional prov-

ince of the States. I don't think it would do any good, and I don't—and I think it is dangerous, for that reason because of the principle on which it rests.

Senator ERVIN. Haven't the courts consistently held that the provisions of the 14th amendment and the 15th amendment, allowing Congress to enforce the amendments by appropriate legislation, merely authorized Congress to adopt laws which would prevent the States from violating the amendments, and do not give Congress the affirmative power to enter the domain of State legislation which these amendments cover? Therefore, isn't it true that these bills do not constitute appropriate legislation?

Mr. WISE. Unquestionably, unquestionably, that is true. And these bills seek to enter that domain, which goes far beyond the contemplation of the 14th and 15th amendments, in my opinion.

Senator ERVIN. I will ask you this. If the bill S. 2750 does not violate section 2 of article I, and the 17th amendment, in that it attempts to exercise the power to prescribe the qualifications for voters, which are already prescribed in that section of that amendment?

Mr. WISE. I think that is unquestionably true.

Senator ERVIN. And I will ask you if the operative provision of this bill, S. 2750, is not unconstitutional in that it does not attempt to deal with any question of race, color, or previous condition of servitude, but is restricted entirely to dealing with literacy tests, which is a test that falls within the legislative domain of the State.

Mr. WISE. No question about it in my opinion, Senator.

Senator ERVIN. I would also like to ask you if in the clause of the second section of S. 2750, which speaks of any person, whether acting under color of law or otherwise—doesn't the use of those words "or otherwise" indicate that that is an effort to deal with individuals as well as with State action, and that insofar as it attempts to deal with individuals, it is violative of the 14th and 15th amendments, which only deal with State action?

Mr. WISE. That is certainly reasonable, sir. I hadn't thought about that. But it certainly is reasonable.

Mr. WATERS. I just have one question, Mr. Chairman.

The Mississippi constitution purports to deny the vote to Indians who are not taxed. I wonder if you would care to comment on that.

Mr. WISE. I don't recall, but it seems to me that there is a provision in the U.S. Constitution with reference to Indians not taxed. In Wyoming, if I recall correctly, they are not counted. Isn't that true?

Mr. WATERS. I refer to that portion of the Mississippi constitution numbering the Indians among those people not entitled to vote. That has never been changed, has it, even though in November of 1960 your constitution was modified to set up one additional standard.

Mr. WISE. It has not been changed. That is true. It has been in the constitution as far as I know from the beginning.

Mr. WATERS. And the change that was made in November of 1960 was a change which, in addition to the disqualifications of bribery, burglary, theft, arson, false pretenses, perjury, forgery, embezzlement, bigamy, added to it the provision of good character?

Mr. WISE. Yes, sir.

Mr. WATERS. Thank you, Mr. Wise. I have no further questions.

Senator ERVIN. I might say that provision about the Indians in the

Mississippi constitution is in perfect harmony with the second section of the 14th amendment, which uses exactly the same language.

Mr. WISE. Exactly. I think that is where they got the—from the U.S. Constitution, as far as I know.

Senator ERVIN. I want to commend you. I have read your statement in full, and I want to commend you on its excellence.

Mr. WISE. Thank you, Senator. It has been a pleasure to be with you.

(Whereupon, at 1 p.m., the hearing was recessed, to reconvene at 10 a.m., Tuesday, April 10, 1962.)

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

TUESDAY, APRIL 10, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin (presiding), Keating, Johnston, and Long of Missouri.

Also present: Senator Barry Goldwater, of Arizona.

William A. Creech, chief counsel and staff director; and Bernard Waters, of minority counsel.

Senator ERVIN. The subcommittee will come to order.

The subcommittee welcomes here this morning the Attorney General of the United States. We will be glad to hear from you at this time.

STATEMENT OF ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY BURKE MARSHALL, ASSISTANT ATTORNEY GENERAL

Attorney General KENNEDY. Mr. Chairman, I am particularly happy to be here before your subcommittee, as I spent so many years associated with you and working for you.

I was on the other side of the table then, but I am delighted to be here today.

Senator Ervin, and members of the committee, I am here because I believe strongly that the American system of government depends upon the fullest participation of all its citizens. Therefore, I appreciate this opportunity to testify in support of S. 2750. This bill would end abuses in the administration of State literacy requirements for persons seeking to have a voice in their government. It would ban the unfair use of literacy tests to prevent literate persons from voting. Its enactment would give new fulfillment to our basic belief in justice under the law.

The administration fully supports this proposal. It should be enacted without delay.

When the 15th amendment was adopted in 1870, it became illegal to practice racial discrimination in the voting process. Yet it is necessary today, 92 years later to file lawsuit after lawsuit to make this constitutional command a reality.

The gap between principle and practice is particularly acute in States with large Negro populations. In 1959, in 16 counties in which Negroes of voting age were the majority, not one Negro was registered to vote. In 49 other such counties, fewer than 5 percent of the eligible Negroes were registered. In 23 counties in one State with a large Negro population, and at least 63 in another, the percentage of registered Negroes of voting age are less—often very substantially less—than 10 percent. In 66 of those counties the number registered can only be termed insignificant.

These and similar statistics have been a source of major concern to me and the Department since I took office. I must report to the subcommittee that beyond question they are mainly the result of discrimination by registration officials. Further, our experience shows overwhelmingly that the principal cause and method of discrimination has been the abuse of so-called literacy or interpretation tests and similar performance tests. My own conclusion is confirmed by the findings of others with longer experience and unquestioned expertness in this field. In 1957 the Southern Regional Council found that literacy test—or interpretation or other types of performance tests—was the legal weapon used most often to discourage and stop Negroes from registering to vote. In its 1961 report the Commission on Civil Rights made a similar finding.

This type of discrimination is accomplished most frequently by giving wide discretion to the persons who administer the tests while making objective review of their actions as difficult as possible.

Some tests involve reading. Who is to determine what is "satisfactory reading"? Who has the last word on whether a person reads too quickly or not fast enough? Is it right for an applicant to be flunked for mispronouncing a word? No standards have been set nor are any available. The result is that registrars can pass or fail applicants as they see fit.

Opportunities for discrimination also exist in the administration of writing and understanding tests. Applicants can be required to write from the dictation of the registrar—which can be fast or slow, distinct or indistinct, or even inaudible. They might have to write long or short statements, interpret complex or simple test materials—all to the satisfaction of the examiner. In the last analysis the opportunities for discrimination are endless, as I think some case instances will illustrate.

One Negro, who has applied to register four times since 1957, explained to the court that he had not tried to interpret a constitutional provision dealing with a city's debt liquidation because "it was so complicated." The U.S. district judge studied the lengthy provision and commented, "I am inclined to agree with you on that."

Persons, whose exact ages appeared on their applications, were denied registration because they inserted the phrase "since birth" or "all my life" in a blank calling for the length of their residence in the county.

Similarly, Negro applicants who stated their names in four places on one application form were rejected because they failed to insert it in a fifth blank.

Elsewhere, a Negro schoolteacher was rejected because in reading a long passage aloud perfectly, she pronounced "equity" as "eequity."

White applicants in those same districts, on the other hand, have been assisted in completing the forms, and sometimes they have been registered without taking any test.

These particular examples eventually could be corrected through litigation and we have cases of voting discrimination in various stages of progress. But the area of discretion in all these types of performance tests is so wide that other methods of abuse always can be found.

The Federal Government must deal with this problem. The issue is not whether to act, but how.

We ask for nothing more than new remedies for old wrongs. This administration believes States may legitimately require their voters to have the ability to inform themselves about election issues. I think it is clear the bill does not prevent the States from requiring literacy or understanding ability of their voters. That objective is not wrong.

The wrong lies in the manner in which literacy and understanding are determined. Our proposal deals with manner and method—not with ultimate goals.

What we propose is to substitute an objective standard for the present subjective color bar to Federal voting. The bill we support recognizes a fact of our national life: Persons who have completed the sixth grade are qualified to vote and are fully capable of intelligent participation in the democratic process—by any reasonable standard fairly applied.

After exhaustive studies, the Bureau of the Census has determined that completion of six grades of school can be equated with literacy. The Civil Rights Commission unanimously recommended Federal law to make completion of six grades sufficient qualification under any State literacy or interpretation test. Experience in States with no racial discrimination problem demonstrates persons with a sixth-grade education can pass reasonable tests impartially applied.

Responsible authorities in such States do not believe our proposal would add illiterates to their voting rolls, or would significantly affect the administration of their qualification tests in any way. Answers to our inquiries from a number of these States—Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, Wyoming—make it clear that no question would arise as to the qualifications of any person with as much as a sixth grade education.

Senator KEATING. Mr. Chairman, if the Attorney General will pardon an interruption at this point, he referred to the State of New York, and it would seem to me that this is an appropriate place to place in the record a letter to the chairman from Gov. Nelson A. Rockefeller of New York, with regard to this subject.

Senator ERVIN. If there is no objection. On the other hand, it might be more appropriate to make that statement a part of the record immediately following the Attorney General's statement.

Senator KEATING. Thank you very much.

Senator ERVIN. The statement will be placed in the record immediately after the Attorney General's statement.

Attorney General KENNEDY. For these reasons, Mr. Chairman, I conclude that the manner of measuring voter competency which we

recommend will eliminate the arbitrary aspects of the present system while permitting the States to set whatever basic qualifications it considers desirable to achieve a qualified electorate.

Before asking for this legislation, I fully considered whether the problem could be solved without new legislation. This was in keeping with the policy of the administration. Prior to the first session of this Congress the President explained that, before recommending any new legislation in this field, we wished to test the existing tools with vigor and imagination.

We have done so, and we have made significant progress. However, our experience shows that existing laws are inadequate. The problem is deep rooted and of long standing. It demands a solution which cannot be provided by lengthy litigation on a piecemeal, county-by-county basis. Until there is further action by Congress, thousands of Negro citizens of this country will continue to be deprived of their right to vote.

Next, I wish to comment briefly on a special aspect of the administration proposal. The bill also would benefit citizens of Puerto Rican origin who possess the required educational background. These persons were educated under the American flag in schools in which Spanish is the classroom language. They are literate citizens, and they can be intelligent voters. The numerous Spanish-language news media available in the United States amply inform their readers and listeners about public issues. We have a national obligation to take steps to eliminate the cause of their disenfranchisement.

Let me say a word or two about the constitutional basis for the proposed legislation. I am fully conscious of the questions that have been raised on this point, and we have gone into the matter with great care and thoroughness. I am filing with the subcommittee a full legal analysis of the problem. But the essential constitutional basis for the proposed legislation is really quite simple.

On their face and as a matter of history, the 14th and 15th amendments are an affirmative grant of power to Congress to enact legislation to guarantee the rights protected by these amendments, including principally the right to vote.

I have no doubt that this bill is valid under that grant of power. There is no question that widespread deprivations of the right to vote because of race have occurred and continue to occur. The question is not whether this bill is valid, but whether it would correct the situation. Voting tests which in this day of high educational achievement can exclude persons with a sixth-grade education are potential devices for discrimination. In my judgment, virtually no one with that amount of education has been turned down as a voter for other than racial reasons. Congressional action adapted to correcting this evil is not a questionable innovation. It is overdue.

In this connection I might point out that we have furnished the subcommittee with a list and brief description of all the cases which have been filed under the 1957 and 1960 Civil Rights Acts.

The judgments that have been entered in completed cases are supported by judicial findings of racial discrimination in the counties. I do not suppose that anyone would question but that they are constitutional. All that this bill would do is to take an overall corrective step based upon a similar finding by Congress of racial discrimination.

I believe legislation, to accomplish directly what can be unquestionably done through litigation, is plainly justified under the 14th and 15th amendments.

Since our proposal is limited to the protection of Federal elections, it is supported also by article I, section 4 of the Constitution and the broad, inherent power of Congress to govern the Federal elective process.

As the subcommittee knows, article I, section 4 provides that Congress may at any time make or alter the times, places, and manner of holding Federal elections. This plainly means that the State regulations on voting are subject to some limitations that may be imposed by Congress. I think the bill would be a proper limitation under the provision. As I have said, it is concerned solely with the appropriate, fair, and nondiscriminatory manner of measuring the qualifications of Federal voters under State law.

The same factors also support the bill as appropriate legislation in accordance with the general responsibility of the Congress to keep Federal elections free from discrimination and other corruption.

Finally, these provisions of the Constitution, in addition to the enabling clause of the 14th amendment, support the bill as applied to American citizens educated in schools in Puerto Rico.

In short, Mr. Chairman, this legislation is necessary. It is constitutional. It would meet an urgent national need for which Congress has a direct and unavoidable responsibility under the 15th amendment.

President Wilson once said:

I believe in democracy because it releases the energy of every human being.

In these times we need the vigor and faith of every American as we seek to advance the cause of freedom in a period of perilous cold war. To thwart thousands of our fellow Americans from participating fully in the processes of Government is to weaken that vigor and dilute that faith. We cannot afford it.

The spirit of our democracy and the letter of our Constitution and laws require that there be no further delay in the elimination of false voting standards. Mr. Chairman, the right to vote is the easiest of all rights to grant, and I urge enactment of this bill.

I thank you, Mr. Chairman.

(The letter from Gov. Nelson A. Rockefeller, New York, follows:)

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
Albany, March 22, 1962.

Hon. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your recent letters inviting me to appear at the hearings of the Senate Subcommittee on Constitutional Rights which is considering Federal legislation relating to literacy qualifications for voting.

I regret that I will be unable to attend the hearings scheduled by your subcommittee but I appreciate this opportunity to restate my position, and that of the Republican Party, on the urgent necessity to assure voting rights to all of our citizens. The Republican platform of 1960 pledged:

"Legislation to provide that the completion of six primary grades in a State accredited school is conclusive evidence of literacy for voting purposes."

This is a requisite and essential step to prevent a reasonable literacy requirement from being distorted and used as an instrument of discrimination. I am

pleased that in my own State the board of regents, which administers the literacy tests for voting under New York law, has for many years prescribed tests at the sixth grade level of difficulty.

This approach, however, is aimed at but one of many devices which may be used to deprive qualified citizens of their right to vote. The 1961 Report on Voting by the U.S. Commission on Civil Rights concluded that discriminatory disfranchisement is confined exclusively to eight Southern States and that it can take many forms. Arbitrary registration procedures, economic reprisals, and discriminatory purges from the registration rolls—some of which are undertaken with official State encouragement—are cited by the Commission as additional methods used to deprive certain qualified citizens of their right to vote. It appears that the 1957 and 1960 Civil Rights Acts—the first national civil rights laws enacted after 70 years—must be strengthened by imaginative measures broad enough promptly to eliminate such denials of constitutional rights.

I would hope that the Congress would not limit its concern in this area to the denial of voting rights, which is but one of several fundamental rights of which certain of our citizens are being deprived. Specifically, I urge that action be taken on the detailed recommendations of the U.S. Commission on Civil Rights concerning discrimination in housing, employment, education, and the enforcement of the laws.

Only by attacking the entire spectrum of discriminatory practices can the American promise of equality and dignity for every citizen be fulfilled.

Sincerely,

NELSON ROCKEFELLER.

Senator ERVIN. I would like to ask you a few questions to see how far we are in agreement with respect to the constitutional provisions on this point.

I would like to ask first, if, under our system of government, the States do not have the undoubted power to prescribe the qualifications for voters for members of the most numerous branch of their State legislatures?

Attorney General KENNEDY. They do.

Senator ERVIN. And does not section 2 of article I of the original Constitution and the 17th amendment say in very simple language that those persons shall be eligible to vote for Senators and Congressmen, and I use the word "Congressmen" to mean representatives—

Attorney General KENNEDY. Yes?

Senator ERVIN (continuing). Who possess the qualifications requisite for electors of the most numerous branch of the State legislature?

Attorney General KENNEDY. It does, both of those.

Senator ERVIN. Do you agree with me that it would have been difficult for the Founding Fathers, and those who drafted and ratified the 17th amendment, to have found simpler words to say, in effect, that the States should have the power to prescribe the qualifications of those who should vote for Senators and Congressmen?

Attorney General KENNEDY. I think they established that quite clearly.

Senator ERVIN. Then I would like to ask you this: If every decision, which has been handed down by the Supreme Court of the United States, has not held that the power to prescribe the qualifications of those who are eligible to vote for Senators and Congressmen, in essence, belongs to the States through their power to prescribe the qualifications of those who are eligible to vote for the members of the most numerous branch of their State legislature?

Attorney General KENNEDY. That is correct, Mr. Chairman.

Senator ERVIN. You made a statement a while ago to the effect that you thought this bill could be supported under the provisions of

section 4, of article I, of the Constitution, giving to the Congress the paramount power to regulate the times and places and the manner of holding elections for Senators and Congressmen.

I would like to ask you if there has been a decision of the Supreme Court of the United States or, for that matter, of any other court, which has held that Congress has any power under that particular section to prescribe qualifications of voters?

Attorney General KENNEDY. No, there has not.

Senator ERVIN. And if I may digress a minute, I think if you will read the testimony given by Dean Griswold, of the Harvard Law School, speaking for the Civil Rights Commission, you will find he stated in substance that you could not possibly support this bill on the basis of section 4, of article I of the Constitution.

Attorney General KENNEDY. I think, if it rested solely on that, you could not. I think it would be more difficult, Mr. Chairman.

I think you could make an argument for it, but I think it should not rest solely, certainly, on article I, section 4.

Senator ERVIN. Now, do you agree with me on the proposition that neither the 14th nor the 15th, and I might add, the 19th amendments to the Constitution, add anything to the voting rights of any citizen save and except the right not to be discriminated against on the basis of race or on the basis of sex, or under the equal protection clause, on the basis of any distinction between alleged applicant and other voters?

Attorney General KENNEDY. I would say, generally, yes. They added, however, of course, as you recognize, Mr. Chairman, the power of Congress to legislate in this field.

Senator ERVIN. Yes, I was speaking not with reference primarily to that feature of the power of Congress.

But, to summarize, on the 14th amendment, you will agree that the 14th amendment added nothing to the power of any citizen to vote except the right not to be discriminated against by election laws which apply to different and other citizens?

Attorney General KENNEDY. I think that is, generally, correct.

Senator ERVIN. And you do agree with me that the 14th amendment added no right, no voting right, to any citizen except the right not to have his right to vote denied or abridged by the United States or the States on the basis of his race, color, or previous condition of servitude?

I am addressing my remark with respect to the rights of the citizen and not to the power of Congress under the second section of the 15th amendment in this question.

Attorney General KENNEDY. Yes, and I think it added also "Not to be discriminated against in any arbitrary fashion."

Senator ERVIN. Well, can he be discriminated against in an arbitrary fashion, as far as the 15th amendment is concerned, provided the arbitrary thing is not on the basis of race, color, or previous condition of servitude?

Attorney General KENNEDY. I think, as a general proposition, probably not, but that is how the amendment holds, "in any arbitrary fashion."

Senator ERVIN. Well, do you mean that you read into the Constitution—do you read into the 15th amendment anything except the pro-

hibition of a denial or abridgment of the right of a citizen to vote by the United States or by a State on any basis other than his race, color, or previous condition of servitude?

I have never found it to say anything about "arbitrary."

Attorney General KENNEDY. The 15th, Mr. Chairman, is restricted to race, and the 14th also covers arbitrary discrimination.

Senator ERVIN. Well, under the 15th amendment there is no arbitrary discrimination in voting if the laws, as written, apply in like manner to all persons in like circumstances regardless of their race or their sex.

Attorney General KENNEDY. I do not know, but maybe you can go on and make the point, Senator.

I do not know what we are leading to.

Senator ERVIN. I am leading up to this. I am trying to simplify and shorten this.

I think you and I have substantially agreed up to this point.

Attorney General KENNEDY. That is correct.

Senator ERVIN. But I disagree with you on any observation that the person can declare something arbitrary or unreasonable unless there is something in the Constitution to declare it arbitrary or unreasonable, and I take the position that any law which applies alike to all people, in like circumstances, cannot possibly violate either the equal protection clause of the 14th amendment or the due process clause of the 14th amendment.

In other words, the Supreme Court of the United States had this very question before them in the case of *Pope v. Williams*, I believe, and there defendants made an attack on the action of a State on the basis that the State law was unreasonable. And the Supreme Court of the United States declared in that case that an act of a State legislature, passed in the exercise of its power, did not even raise a Federal question when it was alleged that it was unreasonable.

So I think that decision supports my position that to determine whether any law in this field is unreasonable it is necessary to determine whether the standard is set out in the Constitution and nowhere else.

In other words, as the Supreme Court said in the *Newberry* case, the sole power that Congress has to legislate, and I am speaking now with reference to the first article, the sole power it has to legislate with reference to congressional elections is that which it is given by article I, section 4; that there are no vague or indefinite powers in this field.

Attorney General KENNEDY. I would say, going back to this series of questions, Mr. Chairman, that there is no question that the State has the right to set the qualifications of their voters.

What we are suggesting in this legislation is not setting the qualifications of the voters.

Now, on this *Pope v. Williams* case it states the privilege to vote is within the jurisdiction of the State itself, to be exercised as the State may direct and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.

Now, we have found—

Senator ERVIN. If you will read just a little further you will find the statement that I called attention to.

Here is the statement, to be exact. They said:

"The question, whether the conditions prescribed by the State might be regarded by others as unreasonable or reasonable, is not a Federal one."

Attorney General KENNEDY. Well, we have found, Mr. Chairman, from the work that has been done over the period of the last few years, that there has been a denial of the right to register and to vote to many thousands of our citizens because of their race, because of their color.

And we are suggesting or requesting legislation which will remedy that situation.

This legislation does not set the qualifications of these voters. It merely sets the test, the testing of those qualifications. And, in my judgment, that is clearly constitutional.

If we were setting the qualifications for the individuals then, I believe that it would be unconstitutional and would require a constitutional amendment.

I would agree with you on all of those points, but this legislation does not set the qualifications for the voters. The States can still set whatever qualifications they want, but when they get into these arbitrary tests, or, a question of whether a person is literate or not the individual is assumed to be literate if he has gone through the sixth grade or had a sixth grade education.

If it is an arbitrary question—they can set the fourth grade as a test for qualifications. They can set the 8th grade or the 10th grade, whatever they would like to do.

But on the question of when it is just a vague test, which we have found to have been used to discriminate against our citizens, our Negro citizens, then we feel that steps can be taken and should be taken by Congress to remedy the situation.

Senator ERVIN. Now, with the exception of some of your statements about this particular field I do not know that you and I have reached a disagreement yet.

Attorney General KENNEDY. I think we are getting along fine.

Senator ERVIN. Now, this is my interpretation.

My interpretation is that the only power that Congress has under article I, section 4, the power vested in Congress, is to alter the regulations prescribed by the legislatures of the States or to make new ones as to the times, places, and manner of holding the elections.

Those which relate the times and places will seldom require any affirmative action beyond their designation and as to the regulations as to the manner of holding them, the power cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and ascertained.

The power does not authorize Congress to determine who shall participate in the election or what shall be the qualifications of the voters.

These are matters not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the States.

Now, that is my position with respect to section 4, of article I, and I do not think you are very far from that position yourself.

Now, the point I am trying to make now is that my position is that under our very system of government a State has a right to prescribe the qualifications of those who shall vote in all State and local elections, except it cannot adopt any provision which is inconsistent with the 14th, the 15th, or the 19th amendments.

In other words, I take the position that the Federal Government has no power to take any action whatever with respect to who should vote in the State and local elections, as contradistinguished from Federal elections except where it is prohibited from acting by some provision in the Federal Constitution.

Now, do we have any disagreement about that?

Attorney General KENNEDY. Well, I am not sure I quite followed it all, to tell you the truth, Senator.

Shall I give my position on it?

Senator ERVIN. Yes.

Attorney General KENNEDY. I do not think that—if we relied primarily or solely on article I, section 4, I think that we would have a more difficult time on the constitutionality of the bill that we have recommended. But we are not relying solely on that.

We are getting into article I, section 8, into the 14th amendment and into the 15th amendment.

Now, the 15th amendment, section 1, says the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Now, we have found, from our study and our investigation, that citizens are being denied the right to vote because of their color.

We can give you example after example where that has happened, Mr. Chairman; where a college graduate, who is a Negro, comes in and attempts to register and the registrar claims that he is illiterate; that a white person, who has not completed the second grade, comes into the same place, the same area, and the same registrar allows him to register and says that he is literate. We have had a number, just dozens and dozens, of college professors who have attempted to register and have been declared illiterate, and white people who have had virtually no education have come into the same polling booth and have been allowed to register. We have had Negroes who have been not helped or assisted in any way on their tests and have been denied the right to register.

White people, coming into the same area, have been permitted to register and have been helped materially. I would just like to give you a few more examples, if I may—

Senator ERVIN. Every one of those, every one you cited, if it were done today would be a violation of the literacy test of the State in which occurred.

Attorney General KENNEDY. Well, now, we have the 15th amendment, Mr. Chairman, which I will read:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

And then amendment 15, section 2 says that—

The Congress shall have power to enforce this article by appropriate legislation.

So we come to you and ask for appropriate legislation, because citizens are being denied the right to register and the right to vote because of their color.

Senator ERVIN. Now, that simplifies our discussion, I think.

In other words, what I have been trying to point out is that I think this is fundamental. This bill is a bill to enforce the provisions of the 15th amendment which prohibits the United States or any State from denying or abridging the right of any U.S. citizen to vote on account of his race, color, or previous condition of servitude, and nothing else.

Attorney General KENNEDY. What do you mean, "nothing else?"

Senator ERVIN. I mean that is what you base it on.

Attorney General KENNEDY. Well, no; I also read you article I, section 4:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

We base it on article XIV, the 14th amendment; the 15th amendment; article I, section 4; and article I, section 8. We base it on all of those matters, Mr. Chairman, and not one in particular, but all of them. Some of them are stronger than others.

But I think the 14th and 15th amendments, as far as the Negroes are concerned, are particularly strong. But we also base it on article I, section 4; all of them combined together.

Senator ERVIN. I do not care to discuss that any more, because you agreed with me that nobody has ever been able to find any decision of the Supreme Court of the United States which has ever said that this particular section, that is, section 4 of article I, empowers the Congress to prescribe the qualifications of voters for Senators or—

Attorney General KENNEDY. But, Mr. Chairman, I would say that even if we did that—not just relying on article I, section 4—I would say that if we came in here and offered legislation that set the qualifications of the voters that it would be unconstitutional; not unconstitutional only under article I, section 4, but under the 14th and 15th amendments. I would agree with you entirely then, but we are not doing that. We are not suggesting legislation that will set the qualifications. All we are doing is suggesting legislation which deals with the testing of these qualifications, and the qualifications in this field of literacy have been used in an arbitrary fashion to deny individuals the right to vote because of their color.

Now, we are saying that if a State establishes a vague test on the question, and says an individual has to be literate and does not establish a particular and specific test, and establishes a vague test—we say that if they completed a sixth grade education they should be considered literate.

If they establish a specific and particular test for themselves of a second grade, fourth grade, or eighth grade, we do not change that one single bit. They have some specific test.

It is when they get into an arbitrary area, Mr. Chairman, where we come in. So we are not setting qualifications.

We are not establishing qualifications. All we are getting into is the question of the testing of the qualifications.

I would agree with you completely.

Senator ERVIN. Well, we have gotten back into agreement about section 4, of article I, so I am not going to stay on that any more. I do not want to get into disagreement about that, because I think it is so plain that there is no room for argument.

Attorney General KENNEDY. I do not know who is arguing about it.

Senator ERVIN. Well, now, you say that this bill does not prescribe any test.

Attorney General KENNEDY. No.

Senator ERVIN. Well, does it not say, in effect, that no State can have a literacy test; not only that, they cannot use any test—

Attorney General KENNEDY. Absolutely not, Mr. Chairman.

Senator ERVIN. (continuing). Except where there is a sixth grade education—

Attorney General KENNEDY. No, no; absolutely not, Mr. Chairman. It does not say that at all.

Senator ERVIN. Well, let's see. It says that no person, whether acting under color of law or otherwise—incidentally, I cannot go along with the "otherwise" because I think that is foreign to the law that the 15th amendment and the 14th amendment cannot reach the action of the individuals.

But no State—no person shall subject—I am leaving out part of it—no person shall subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election.

Then it says that the deprivation of the right to vote "shall include but shall not be limited to the application to any person of standards or procedures more stringent than are applied to others similarly situated, and the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico."

Now, does that not say that they cannot subject any person who has completed a sixth grade in any school in any State or the District of Columbia or Puerto Rico to any test?

Attorney General KENNEDY. What it does, Mr. Chairman, is it says that they cannot then label him as "illiterate." Now, they can establish any test of their own. If the State wants to establish a test, a specific and particular test, that an individual has to complete the eighth grade, for instance, they can set up that standard.

They can say, on the question of literacy, that an individual completing the second grade is considered literate. They can establish any qualifications whatsoever.

Senator ERVIN. When the—

Attorney General KENNEDY. But if the State—what this provision does is that if the State just says that an individual has to be literate in order to vote, and then leaves it like that, what our legislation does is to establish that an individual, who has completed the sixth grade, should be considered literate.

Senator ERVIN. You take North Carolina, for instance. North Carolina has a literacy test which says that a person applying for registration must be able to read and write a section of the State constitution in the English language.

Now, if a man came up to register, under this proposal, they could not require him to prove that he was able to read and write a section of the constitution in the English language. The only thing they could require him to do would be to show that he had had a sixth grade education.

Attorney General KENNEDY. Well now, Mr. Chairman, in certain States, and I do not include North Carolina as one of them, in certain States the mere fact that you force an individual to write out the Constitution or interpret the Constitution, or judge him on the performance, as we have in here, the performance in any examination, that that has been used to deny Negroes the right to vote.

Now, it has not been done, to my knowledge, in the State of North Carolina. There are literacy tests in, I believe, about 20 different States.

Senator ERVIN. Or 21, depending on whether Oklahoma has one.

Attorney General KENNEDY. Thank you, Mr. Chairman.

If an individual has gone through the schools of the State of North Carolina, I do not believe that the State of North Carolina would say that he was not literate.

That is all that we establish. And we would not suggest this legislation, Mr. Chairman, if we had not found that, in a number of these States, in a number of these counties, that the registrars and the State authorities are using those kinds of tests that you have decried to prevent somebody from voting because he happens to be a Negro.

Now, a college professor—if you had a less tolerant State—a college professor could come in there and the registrar could ask him to write it out and not like where he puts the period, or how he wrote the particular phrase or the fact that he did not like the way he proceeded and say, just arbitrarily, that he was not literate.

Senator ERVIN. Well—

Attorney General KENNEDY. And we have had that happen again and again.

Senator ERVIN. And I think all those situations could be cleared up with a few old-fashioned criminal prosecutions in the Federal courts.

Attorney General KENNEDY. Well, I appreciate your support on that, Mr. Chairman, but I tell you we are bringing those, but it is going to take a long, long period of time.

And I would like to have you join with us in attempting to try to get rid of it so that it just does not go on, and we can pass legislation to deal with that problem and get rid of it much quicker than we can by bringing lawsuit after lawsuit.

Senator ERVIN. Well, a little while later I want to point out the fact that you have plenty of legislation in the field already, but I would like you to see this.

Attorney General KENNEDY. Could I just point out to you—

Senator ERVIN. I am trying to find out the meaning of this act that you are advocating us to approve.

Would not North Carolina be forbidden, by this act, to make any examination to determine whether a person who had completed the

sixth grade in North Carolina or the District of Columbia, or any other State, or Puerto Rico can actually read and write a section of the State constitution in the English language?

Attorney General KENNEDY. Now, I would say, as you point out, there are some 21 States. We had correspondence from 18 or 14 of them, all of whom has said—New York, Connecticut, Massachusetts, California, and these other States—that this will not change their procedure one single bit, the passage of this legislation.

Senator ERVIN. But, you see, my question is this: I am interested in North Carolina being allowed to prescribe the qualifications of its own voters, as the Constitution authorizes.

And would not North Carolina—if a man came up to register under this, regardless of whether he is a Negro or a white man, would not North Carolina be forbidden by section 2 of this bill from ascertaining whether he actually could read and write provided he could show that he had completed the sixth grade?

Attorney General KENNEDY. That is correct, Mr. Chairman.

I would hope that in the schools of North Carolina, after you have gone through the sixth grade you would be able to read and write.

Senator ERVIN. But not Spanish.

Attorney General KENNEDY. Excuse me?

Senator ERVIN. The people from North Carolina are not able to read and speak Spanish after they complete the sixth grade. They do not teach it in our schools at that level.

Attorney General KENNEDY. They would not have to. All they would have to do—

Senator ERVIN. But a man from Puerto Rico who had a sixth grade education in Spanish, in Puerto Rico could, under this bill—

Attorney General KENNEDY. Yes.

Senator ERVIN (continuing). Could come into North Carolina and register—

Attorney General KENNEDY. Yes.

Senator ERVIN (continuing). And North Carolina would be prohibited from denying him the right to register even though he could not speak or read or write a section of the North Carolina constitution in the English language.

Attorney General KENNEDY. I would say, Mr. Chairman, this is not so unusual.

You have had other legislation that has been passed by the Congress that, because of conditions that exist in 4 or 5 States, it affects all 48, or 50 States, as it is at the present time.

That has happened frequently and this would affect North Carolina.

Senator ERVIN. Well, what I am trying to find out about is whether or not this act does forbid North Carolina to have its own literacy test.

Attorney General KENNEDY. Well, if it gets into a performance in any examination it would.

Senator ERVIN. And it would nullify the provision of the North Carolina constitution which requires a man's literacy to be determined by his ability to read and write the English language—

Attorney General KENNEDY. What it would do is, if he passed the sixth grade in the schools of North Carolina, he would be permitted to vote in North Carolina elections.

Senator ERVIN. If he passed the sixth grade in Puerto Rico—
Attorney General KENNEDY. And if he passed the sixth grade in Puerto Rico.

Senator ERVIN. So, as a matter of fact, in view of the fact that of the 20 or 21 States which have literacy tests, all except Hawaii and possibly Louisiana make the test of literacy dependent upon the man's ability to either speak or read or write the English language, it would nullify to that extent, the laws of those States on that point.

It would also forbid the other 80 or 79 States, as the case may be, from ever adopting any statutes to establish literacy tests based on the use of the English language exclusively.

Senator KEATING. You have run up our States.

Senator ERVIN. No; I am thinking about the number of Senators. I will withdraw that.

In other words, this act, in plain and simple English language, would nullify all the literacy tests now in 20 or 21 States insofar as they are based upon speaking English, and reading and writing the English language, and would forbid the other 29 or 30 States, as the case may be, from ever adopting any such laws, would it not?

Attorney General KENNEDY. No. I know I am in trouble when you stand up, Senator.

(At this point of the hearing, Senator Johnston left the committee room.)

Senator ERVIN. Well, if this bill would not affect the literacy test, as established and applied in the States, why is it offered?

Attorney General KENNEDY. Would you repeat that? I did not—

Senator ERVIN. Maybe I had better ask you another question before I repeat it.

You take the position that this act does not have any effect upon the State literacy laws now in existence in 21 States.

Attorney General KENNEDY. What I say, Mr. Chairman, is that if they have a performance test in any of these States, and performance on the question of literacy, that this establishes a means of testing literacy.

If they have a specific and particular test, in any one of these States, any one of these 21 States, for instance, that an individual has gone through the third grade or the fourth grade or some particular specific kind of a test, then this legislation will not affect that.

They can establish their own qualifications.

Senator ERVIN. I disagree with you most emphatically on that. If a man in North Carolina applies for registration, and shows that he has completed the sixth grade, either in Puerto Rico or some other State or in North Carolina, and yet it appears that he cannot read and write a section of the North Carolina Constitution in the English language, notwithstanding that fact, would they have to register him and let him vote under this?

Attorney General KENNEDY. Yes.

Senator ERVIN. Before it does—

Attorney General KENNEDY. You said 21 States. I went through that as far as North Carolina is concerned.

But the other States, I would have to look at each one's legislation to see what effect this legislation has on that.

Senator ERVIN. Well, I would say I am not in too great a hurry because, frankly, I believe I am fighting to preserve the Constitution of the United States for the benefit of all races and all generations of Americans, and that is the reason I am asking these questions.

Senator KEATING. Mr. Chairman, after you have completed I hope the Attorney General will be able to stay because I have a few questions to ask him.

Senator ERVIN. Yes.

Well, my study of the literacy tests in 21 States, and I am including Oklahoma, because from my study I am not sure whether they reenacted their literacy tests after the decision in the *Guinn* case, in which their literacy tests were inseparably joined to the "grandfather clause," although the court said that the literacy test alone would have been all right.

Out of these States every one of them has literacy tests as to the ability to read and write. Some of them say "read and write." Some of them say "read or write," and a few say "speak" the English language.

Every one of them has that requirement as to the English language except Hawaii and possibly Louisiana, which may have an alternative, that it is to be according to their ability in the use of the English language or, in the case of Hawaii, the Hawaiian language, or in the case of Louisiana, their mother tongue.

Now, I say this: None of those States would be allowed to base admission of a man to registration and voting on their literacy tests if this statute were to be enacted.

Attorney General KENNEDY. I have not looked at each one of the States, Mr. Chairman. So I do not know what—but, assuming that all 21 States, that their literacy tests are based on that kind of a test, then it would have an effect.

Now, I would say in that connection that we have written to each one of these States, and we have received answers from Alaska, Arizona, California, Connecticut, Delaware, Maine, Massachusetts, New York, Oregon, Washington, Wyoming, from the responsible authorities, and they say they do not believe our proposal would add any illiterates to their voting rolls.

Senator ERVIN. I might add that the committee has received statements from the attorneys general of Alaska, California, and Maine, to the effect that they believe this bill is unconstitutional.

We have those letters.

Attorney General KENNEDY. That is why lawyers are hired, I suppose. There will be disagreement.

I think it is quite clearly constitutional.

Senator KEATING. Which States are those?

Senator ERVIN. California, Alaska, and Maine are three, we know.

Well, we will pass on a little further and see if we agree on this: that the Supreme Court of the United States has held in *Williams v. Mississippi*, 170 U.S. 225; *Guinn v. United States*, 238 U.S. 347, and *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, that literacy tests, requiring one to be able to read and write the English language, are perfectly valid as far as the Constitution of the United States is concerned, has it not?

Attorney General KENNEDY. I do not know. I am not familiar with those cases, but I am sure literacy tests are constitutional.

Senator ERVIN. And, furthermore, has not the Circuit Court of Appeals, in the circuit embracing Louisiana, held in the case of *Trudeau v. Barnes*, reported at 5 F. 2d 63, that the Louisiana State literacy test is valid, and has not the Supreme Court of the United States refused to grant certiorari to review that decision?

Attorney General KENNEDY. I am not familiar with that. If you say so.

Senator ERVIN. Well, I say so.

Attorney General KENNEDY. Well, I agree then.

Senator ERVIN. Now, I will come down to what I think the substantial disagreement between the Attorney General and myself, in respect to this bill, is.

Now, the fifth section of the 14th amendment does not give Congress the power to pass any kind of legislation it wants on this subject, does it?

Attorney General KENNEDY. The fifth section of what?

Senator ERVIN. The fifth section of the 14th amendment.

Attorney General KENNEDY. Yes; that is correct.

Senator ERVIN. It merely says that Congress shall have the power to pass legislation appropriate to the enforcement of the provisions of the 14th amendment.

Attorney General KENNEDY. That is correct.

Senator ERVIN. And the second section of the 15th amendment merely says that Congress shall have the power to enact legislation appropriate to enforce the provisions of the 15th amendment.

Attorney General KENNEDY. That is correct.

Senator ERVIN. Now, where I disagree most fundamentally with you is on the proposition that this bill constitutes legislation appropriate to enforce the 14th amendment and the 15th amendment.

If my investigation is correct, there are only seven Southern States which have literacy tests, including my State of North Carolina.

Attorney General KENNEDY. I believe that is correct.

Senator ERVIN. And there are either 20 or 21, depending on what you say about Oklahoma, outside of the South that have literacy tests.

Attorney General KENNEDY. That is fine. Once again I have not got the exact figures, but I am sure that is correct.

Senator ERVIN. Well, does the Department of Justice have any evidence that literacy tests, which are predicated upon the ability to use the English language, are being used to deny or abridge the rights of any Negroes to vote in any of the 13 or 14 States lying outside the solid South?

Attorney General KENNEDY. No.

Senator ERVIN. And I believe that the Attorney General is quite right and agreed with me a while ago that if every State behaved as well as my State of North Carolina, there would be no necessity for this law.

Attorney General KENNEDY. I believe that is correct, Mr. Chairman.

Senator ERVIN. So this legislation is based on an effort to reach a situation in only 6 of the 50 States of the Union. Yet this bill would prohibit any of the other 44 States of the Union from having any

literacy tests, for any person who has completed the sixth grade of one of the schools enumerated?

Attorney General KENNEDY. That is not correct.

Senator ERVIN. It would prevent any of those States from denying any person the right to vote for illiteracy——

Attorney General KENNEDY. Right.

Senator ERVIN. Provided he had a sixth grade education?

Attorney General KENNEDY. Correct, if they had just an arbitrary rule such as that.

Senator ERVIN. And the bill does not——

Attorney General KENNEDY. Can I make any further comment on that?

Senator ERVIN. Yes.

Attorney General KENNEDY. The fact is that, perhaps, it applies to only six States, but it applies to hundreds and hundreds of thousands of our fellow citizens.

Now, there are hundreds and hundreds of thousands of Negroes who are being denied the right to register and to vote at the present time, and I gave you some examples.

And the method that is being used most widely in the United States at the present time, to deny an individual the right to vote who happens to be a Negro, are these literacy tests.

Now, we have come in here with a recommendation as to how that situation can be remedied. Now, you can say that it applies only to five or six States——

Senator ERVIN. I have not said that. I said it applies to all 50.

Attorney General KENNEDY. You can say that the discrimination applies in only five or six of those States. I think that is unfortunate, and I think we should do something.

The Federal Government has a responsibility to all of our citizens, to make sure that they have the right to exercise their franchise when it is being denied to them because of the fact that they happen to be of the Negro race.

Now, we are trying to get some legislation which will remedy that situation. Now, you can say it applies to only five States, but it applies to hundreds and hundreds of thousands of our fellow citizens.

I would hope that you would join with us in sponsoring this legislation to remedy this situation, Mr. Chairman.

Senator ERVIN. I love the Constitution too much to do so, sir.

Attorney General KENNEDY. Well, I love the Constitution also, Mr. Chairman, but this does not violate the Constitution.

Would you be in favor of this legislation if it was a constitutional amendment then?

Senator ERVIN. Well, I would have to make a decision on that point if somebody proposed it. I have enough trouble with this bill right now.

Attorney General KENNEDY. But I think——

Senator ERVIN. I do not claim that this bill only applies to six States.

I claim that this bill applies to all of the 50 States.

Attorney General KENNEDY. It will remedy the situation in only six States, Senator.

I cannot believe that in North Carolina, or in any of these other States, that you are going to say that somebody who completed the sixth grade in North Carolina or one of these other States is not literate.

Senator ERVIN. Well, I would say if the person has completed the sixth grade and has not learned to read and write, that he ought not to be allowed to vote.

Attorney General KENNEDY. Well, you have a school system in North Carolina where you complete the sixth grade and you cannot read or write?

Senator ERVIN. I think that is a question of fact. I know some people, too, who have Ph. D.'s who I do not think are educated.

Attorney General KENNEDY. Well, we are not suggesting that they be educated, Mr. Chairman. All we are asking is that they be able to read or write——

Senator ERVIN. Well, that is what I am——

Attorney General KENNEDY. On the question of literacy.

Senator ERVIN. Well, we have agreed on this, as I understand it.

If this bill becomes law we have agreed that it would prohibit any of the 50 States from establishing any literacy tests which would enable them to deny persons the right to register and vote on the grounds of illiteracy, provided they can show they have completed the sixth grade in school.

Now, the point I am making is this: There are 44 States that have not been guilty of any offenses under the 15th amendment, and yet they are being denied the right to prescribe the literacy tests, based upon the ability or capacity of the person to read or speak English, for individuals who have completed the sixth grade, even in a Spanish school in Puerto Rico.

Now, the Supreme Court of the United States said this. And I take the position, before I read this, that this bill is not appropriate legislation to enforce either the 14th or the 15th amendments, because its applicability is not made to depend upon the violation of the amendments.

It abolishes or curtails, at least, the constitutional rights of 44 States which have not been guilty of offenses, to prescribe their own literacy tests.

In the *Civil Rights cases*, 109 U.S. page 3, the Court said that until some State law has been passed or some State action, through its officers or agents, has been taken adverse to the rights of citizens sought to be protected by the 14th amendment, no legislation of the United States or any proceeding under such legislation, can be called into activity.

Notwithstanding, here 44 of the States have not been guilty of the passage of any law or of any action adverse to the rights of citizens of the United States, under the 14th amendment, so far as voting is concerned. Yet this bill will call into activity its provisions against those 44 States and deny them the right, which they undoubtedly possess under section 2, to prescribe their own literacy qualifications.

Attorney General KENNEDY. No; the legislation does not do that.

Senator ERVIN. Why, Mr. Attorney General. I thought you just agreed with me in the proposition that under this law all 50 States

would be denied the right to deny a person the right to vote on the ground of literacy, provided he had completed the sixth grade.

Attorney General KENNEDY. That was different from what you just said.

Senator ERVIN. No, it is not.

Attorney General KENNEDY. You said there, Mr. Chairman, that no State would be able to have any literacy test, and our legislation does not do that.

Senator ERVIN. It does.

Attorney General KENNEDY. The way you phrased it the second time is correct.

Senator ERVIN. Although these 44 States have not passed any laws to discriminate against any voter on this ground, and have not by their State action denied any voter his right to vote on that ground, this bill would apply to all 50 States. And in the case of 44 of them, it would deny them, from the time of enactment, the power to enact any law which would give them the right to deny a person the right to register on the ground of illiteracy, if he was able to show that he had completed the sixth grade.

So it has been called into activity. In other words, this bill calls the provisions of the 14th and 15th amendments into activity to deny States their power to enact their own literacy tests inconsistent with this bill, notwithstanding that they have not violated these amendments in any respect in this field.

This matter was before the Supreme Court in several other cases, including *United States v. Harrison*, 106 U.S. 624.

The Court said this, speaking of sections 1 and 5 of the 14th amendment—section 5 being the enforcement provision—"the language of the amendment does not leave this subject in doubt when the State has been guilty of no violation of its provisions."

He is talking about the "State" in the singular.

"When the State has been guilty of no violation of this provision, when it has not made or enforced any law abridging the privileges or immunities of the citizens of the United States, when no one of its departments has deprived any person of life, liberty, or property without due process of law, nor denied any person within the jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative branch, and administered by its executive department, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

"Section 5519 of the Revised Statutes has not limited that effect solely in case the State shall abridge the privileges or immunities or privileges of citizens of the United States or deprived any person of life, liberty, or property, without due process of law, nor deprived any person the equal protection of the laws.

"It applies no matter how well the State may have performed its duty."

And so this bill would apply to 44 States and deny them the undoubted right to prescribe whatever literacy tests they saw fit, even though they have not violated the 14th or the 15th Amendments.

And I say, for that reason, that it is not appropriate legislation.

Attorney General KENNEDY. Now, Mr. Chairman, that legislation does not do that. It does not prescribe or stop the State from passing literacy tests.

Senator ERVIN. But it would certainly require——

Attorney General KENNEDY. With all respect for you and your ability, you keep bringing that point out, and we are not suggesting that.

We are not suggesting that, Mr. Chairman, and then we correct it, and we have corrected it the second time. But we are not suggesting that. We are not recommending that.

Senator ERVIN. Oh, I agree, it does not say you cannot have any kind of illiteracy test.

Attorney General KENNEDY. But that is what you said.

Senator ERVIN. But it says you cannot deny men the right to vote on the basis of your literacy test if he has a sixth-grade education.

That is what it says.

Attorney General KENNEDY. No, not exactly.

Senator ERVIN. If it does not say that——

Attorney General KENNEDY. Well, I will tell you what you could do.

A State could establish the fact that anybody going through the second grade—and this legislation would not have any effect on that—it could establish that anybody going through the third grade or the eighth grade, as long as there is a specific, that kind of a test, and then there is no problem about it, Senator.

When they just put a general provision in, dealing with the fact that somebody has got to be literate, and a registrar sits down and the man sits on the other side, and the registrar is the one who decides whether the person is literate, we are trying to hit at that kind of practice.

So a State can prescribe any literacy test that it wants, but if it has just an arbitrary test to find out whether a man is literate, we are saying that you have got to assume that anybody who has passed the sixth grade, gone through six grades, should be considered literate.

And I just cannot believe that we are arguing in this day and age, if that is what it is coming down to, Senator—that you are arguing that somebody who goes to the sixth grade should not be considered literate.

I mean, that is what is so unbelievable——

Senator ERVIN. I am arguing that the question of whether a person is literate is a question of fact to be determined by his capacities to read or write, and not a question of what grade he may have completed.

Attorney General KENNEDY. Senator, would you not be upset or disturbed at the facts that show that these kind of tests have been used in all of these cases to prevent Negroes from registering?

Does that not disturb you or does it?

Senator ERVIN. It does disturb me, but it does not disturb me nearly as much as seeing an effort made to nullify the simplest words in the Constitution.

Attorney General KENNEDY. But we are not doing that now, Mr. Chairman. You come back to the other thing, that we are establishing qualifications.

We are not establishing qualifications. The State can have any qualifications that it wants, but when it gets to the question of literacy we are just establishing a test by which literacy can be determined, Mr. Chairman.

Senator ERVIN. Well, you are asking Congress to do that when the Constitution of the United States prohibits Congress from doing so.

That is what you are saying.

Senator KEATING. Mr. Chairman, will you yield for one question for clarification here?

Senator ERVIN. Yes.

Senator KEATING. Mr. Attorney General, would you clarify your statement that a State would be able to impose a more rigid qualification such as the eighth grade under this legislation?

Is it your view that a State, under this legislation could establish high school graduation or the eighth grade or some other literacy qualification?

Attorney General KENNEDY. It could.

Senator KEATING. You think it could?

Attorney General KENNEDY. There is no question, Senator. This deals——

Senator KEATING. What do you base your statement on?

Attorney General KENNEDY. What this does is deal with subjective tests. It does not outlaw objective tests at all.

For instance, on page 3, line 16, what it deals with, Senator, is "performance in any examination" to determine literacy in the performance of any examination, but the State can establish any objective test that it sees fit.

And this legislation——

Senator KEATING. Even exceeding the completion of the sixth grade?

Attorney General KENNEDY. That is correct. It is entirely up to the State.

Just as long as it is not used arbitrarily to deny to somebody, because they happen to be a Negro, the right to register and the right to vote.

Now, if the white people and Negroes have to go through the eighth grade or the tenth grade then the State can establish that.

Senator KEATING. On what language in S. 2750 do you base your interpretation?

Attorney General KENNEDY. I think the main point, Senator Keating, is on the question, "the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination."

That is what it——

Senator KEATING. In other words, your point is that if they do not give an examination then they can establish even a more stringent requirement——

Attorney General KENNEDY. That is correct.

Senator KEATING. Than the sixth grade?

Attorney General KENNEDY. That is correct, Senator.

Senator ERVIN. Before I proceed, I might say that I am not contesting for any kind of literacy law or anything else.

I am merely suggesting that the States retain the right given them under our system of government with respect to State and local elections and the right under section 2 of article I to say whether they want to have literacy tests and, if so, what kind they want.

On this question about the sixth-grade education, I am going to let you and Secretary Ribicoff discuss that. He wrote a letter to Vice President Johnson in which he said that 20 million Americans over the age of 25 cannot adequately read an English language newspaper, and only 8 million of those have completed less than 5 years of school. To my mind, it is most unlikely—I am speaking for myself now—that the other 12 million of these 20 million went through five grades of school and dropped out before they completed the sixth.

But that is a question of fact and not of law.

Now, in addition, I contend most seriously that this provision does not constitute appropriate legislation to enforce the 15th amendment, or the 14th, for that matter, because it applies, immediately upon its enactment, to 44 States which have not violated either one of these amendments in this particular field.

I contend, in the second place, that it is not appropriate legislation to enforce the 15th amendment, because it is not confined in its terms to discrimination in voting on the basis of race, color, or previous condition of servitude.

Now, I wish you would look at section 2.

Section 2 is the operative part of this bill, is it not?

Attorney General KENNEDY. Yes.

Senator ERVIN. There is not a single syllable in section 2 which has any reference to race or color or previous condition of servitude or the denial or abridgement of anyone's rights to vote on that basis, is there?

Attorney General KENNEDY. That is correct.

Senator ERVIN. I call attention to the case of *United States v. Reese*, 92 U.S. 214. This was a case charging two of the inspectors of a municipal election in Kentucky with refusing to receive and count in such election the vote of a citizen of the United States of African descent.

The second and fourth counts were based, respectively, on the third and fourth sections of the act of May 31, 1870, which did not confine their operation to unlawful discrimination on account of race, color, or previous condition of servitude.

In holding that the third and fourth sections of the act did not constitute appropriate legislation for the enforcement of the 15th amendment, the Supreme Court said, and I will not read all of it, that—

it follows that the amendment has vested the citizens of the United States with a new constitutional right which is within the protecting power of Congress.

That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.

This, under the express provisions of the second section of the amendment, Congress may enforce by appropriate legislation.

This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose.

The power of Congress to legislate at all on the subject of voting at State elections rests upon this amendment. The effect of article 1, section 4, of the Constitution, in respect to elections of Senators and Representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive

the vote of a qualified elector at State elections. It is only when the wrongful refusal at such election is because of race, color, or previous condition of servitude that Congress can interfere and provide for its punishment.

If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized.

The opinion discusses the provisions of those sections and points out that they are not confined to persons denied rights on the basis of race, color, or previous condition of servitude, and therefore, that the Court must decide that Congress has not yet provided, by appropriate legislation, for the punishment of the officers charged in the indictment, and they gave judgment for the defendants.

That involved the third section, which they struck down as unconstitutional and which was directed solely against the acts of State election officials.

In the case of the *United States v. Cruikshank*, 92 U.S. 542, they said that the indictments for denying a person the right to vote at a State election had failed to set forth that the denial was on the basis of race—that it did not state a violation of the 15th amendment, and the indictment could not be based upon it.

They said, in order for the 15th amendment to come into play, there must be an intent to interfere with the right guaranteed by that amendment, which was the right not to be discriminated against on account of race, color, or previous condition of servitude.

Mr. Attorney General, I do not want to keep you here all day or postpone the other questions by the other members of the committee or counsel, so I am trying to bring an extremely long discussion to an end as soon I can.

Attorney General KENNEDY. I appreciate that.

Senator ERVIN. *Karem v. United States* was reported in 121 F. 250, and 61 L.R.A. 437, and was an opinion by Circuit Judge Lurton, who later became one of the most distinguished members of the Supreme Court of the United States.

He was speaking about striking down some of the legislation as invalid because it was not confined in its application to persons who "were denied the elective franchise on the basis of race, color, or previous condition of servitude, but the power of Congress to legislate at all upon the subject of voting in purely State elections is entirely dependent on the 15th amendment. It does not confer the right to vote; that is the prerogative of the State. It only confers the right not to be excluded from voting by reason of race, color, or previous condition of servitude, and this is the right Congress can enforce."

He says there are certain very obvious limitations on the power of Congress to legislate for enforcement of this article. The legislation authorized by the amendment must be addressed to State action in some form or some agency action.

Secondly, it must be limited to deal with discrimination on account of race, color, or previous condition of servitude.

In my honest judgment, this bill is not appropriate legislation under section 2 of amendment 15, because it is not limited to people who are qualified voters who are denied the right to vote on account of their race, color, or previous condition of servitude.

As a matter of fact, it has no relation whatever to that power.

Now, I have one other point, and then I hope that, conscientiously, I can subside in my defense of the Constitution of the United States.

29 Corpus Juris Secundum says this: that Congress can legislate concerning State and municipal elections under the 15th amendment, and then solely for the purpose of preventing discrimination on account of race, color, or previous condition of servitude.

So this cannot be appropriate legislation under the 15th amendment, and it cannot be appropriate legislation under the 1st article, because Congress has no right to have anything to do with qualifications under that.

Now, the third point I wish to make is that this is not appropriate legislation under either the 14th or the 15th amendment, because those amendments prohibit certain actions by the State, and the only legislation which Congress can enact under those amendments is legislation to prohibit the State from doing something in violation of these amendments.

Instead of doing that, this bill undertakes to let Congress step in and pass an affirmative act saying what can be done instead of saying what the States cannot do.

I want to read first the references to the 14th amendment from a decision in the case of *United States v. Cruikshank* when it was before the circuit court, and as it is reported in 1 Woods 316.

The judge said that it is a guarantee of protection against the action of the State government itself. It is a guarantee against the assertion of arbitrary and tyrannical power on the part of the Government and the legislature of the State.

It is not a guarantee against the commission by an individual of offenses; the power of Congress, either express or implied, does not extend to the passage of laws for the suppression of crime within the States.

Now, here is what I particularly direct attention to.

The enforcement of the guarantee does not require, nor authorize Congress, to perform the duty that the guarantee itself recognizes to be the duty of the State to perform, and which it requires the State to perform.

When this case was before the Supreme Court, the Supreme Court said that the 14th amendment prohibits the State from denying to any person, within its jurisdiction, the equal protection of the laws, but this provision does not, any more than the one which precedes it, and the one which we have just considered, add anything to the rights which one citizen has under the Constitution as against another.

The equality of the rights of citizens is a principle of republicanism. Every republican government is duty bound to protect all of the citizens in the enjoyment of this principle, if it is within their power.

That duty was originally assumed by the States and it still remains there. The only obligation resting upon the United States is to see that the States do not deny that right.

This amendment guarantees no more. The power of the National Government is limited to the enforcement of that guarantee.

Attorney General KENNEDY. I agree.

Senator ERVIN. And this bill goes beyond that power and lets the Federal Government act affirmatively.

Now, the greatest case on that subject is the *Civil Rights* case of 1883, and I will read a head note from that. To save time, I am not going to read the decision.

It says that the 14th amendment is prohibitory upon the States only, and that the legislation authorized to be adopted by Congress for enforcing it is not direct legislation on the matters respecting which the States are prohibited from making or enforcing certain laws or doing certain acts, but it is corrective legislation such as may be necessary or proper for counteracting and reversing the effect of such State laws or such acts.

So, to summarize, I say that the bill is not appropriate legislation under either the 14th or 15th amendment. It is not appropriate legislation under either one of them because it is phrased to act immediately on 44 States which have not violated either amendment in the voting field.

In the second place, it is not appropriate legislation to enforce the 15th amendment, because it is not confined to the denial or the abridgement of the right of a citizen to vote on account of his race, color, or previous condition of servitude, and it is not appropriate legislation under either the 14th or the 15th amendment, because it is not limited to preventing States from violating those amendments, but is an effort on the part of the Federal Government to usurp and exercise the power vested in the States, under our system of government, and under the 2d section of article I, and the 17th amendment. I am sorry that I took so much time on that, and I regret very much that my good friend, the Attorney General, does not entertain the good sound views on this subject that I entertain.

(At this point, Senator Goldwater leaves the hearing room.)

Attorney General KENNEDY. Likewise, vice versa.

Senator KEATING. Mr. Attorney General, in the first place, I would like to commend you on your very fine statement you made with regard to the need for this legislation.

It will be very helpful to those of us who are seeking to see some legislation enacted at this session of Congress on this subject.

You have done a fine job in defending the Constitution of the United States.

Senator ERVIN. May I ask a question?

Senator KEATING. I will be glad to yield in just a minute. I just want to get this in the record.

The difference between you and the chairman, and the difference between this Senator and the chairman, is not any lack of zeal in defending the Constitution of the United States.

I would yield to no one in that regard, as I know you would not but there may be sincere differences as to the interpretation of the Constitution.

I would like to ask some questions, but, first, I will yield to the chairman so he may complete his testimony—pardon me—his questioning.

Senator ERVIN. I appreciate the remarks of the Senator from New York about reasonable men disagreeing, but, you know, the truth of it is that during the first 172 years that sections 2 and 4 were in article I, there was absolutely no disagreement by people on the fact that these sections gave the States the right to describe the qualifications of voters. That disagreement is of recent origin.

Attorney General KENNEDY. Pardon me.

Senator ERVIN. Yes!

Attorney General KENNEDY. I just say I think it is overdue.

Senator ERVIN. The disagreement is overdue?

Attorney General KENNEDY. To do something about this though, Mr. Chairman.

Senator ERVIN. Well, they started to do something about this a long time ago. I want to ask you something about that.

There are two statutes in sections 1983 and 1985, of title 42.

I will ask you if they do not give to any qualified citizen of the United States, who is denied the right to register and vote, the right to bring a civil action for damages, or to anyone who is threatened with a denial of his right to vote, a right to bring a suit in equity to prevent his being denied such right?

Attorney General KENNEDY. That is correct. It gives an individual the right to bring such a suit.

Senator ERVIN. Yes; and it does not even stop at giving him the right to damages in law but it says he can bring any other kind of proper proceedings, does it not?

Attorney General KENNEDY. I believe it does.

Senator ERVIN. Yes. So the individual has two remedies, a redress and a remedy, under the statute.

Then, I would like to ask this question: Under section 242 of title 18 of the United States Code, an election official who willfully denies any qualified citizen the right to register and vote is guilty of a criminal offense, punishable by a fine as much as \$1,000 or imprisonment as much as 1 year or both—is that not true?

Attorney General KENNEDY. That is correct.

Senator ERVIN. I will ask you if under the preceding section of the statute, that is section 241 of title 18 of the United States Code, an election official conspires with any other person to deny any qualified citizen of the United States his right to register and vote, he is guilty of a felony and is punishable by fine as much as \$5,000 and 10 years imprisonment, or both?

Attorney General KENNEDY. I believe it is, Mr. Chairman.

Senator ERVIN. Now, the Department of justice has the power to enforce these two criminal statutes, does it not?

Attorney General KENNEDY. It does.

Senator ERVIN. And it has full-time U.S. attorneys in every judicial district in the United States, does it not?

Attorney General KENNEDY. That is correct.

Senator ERVIN. And each U.S. district attorney has a number of assistants to assist him in the performance of these duties?

Attorney General KENNEDY. That is correct.

Senator ERVIN. Are you aware of the fact that there have been virtually no attempts to indict anybody criminally in the area we have been discussing, under either one of these statutes, since about 1950?

Attorney General KENNEDY. There have been efforts, Mr. Chairman, but they have been unsuccessful.

In these areas, where this kind of discrimination is taking place to the greatest extent we have not had very sympathetic—

Senator ERVIN. I am sorry I did not keep the letter, but I wrote several years ago to one of your predecessors to find out how many prosecutions had been instituted under the preceding administration.

I do not remember the exact figures, but he told me there had been

about five, but in two of the cases all they did was send the witnesses before a grand jury and they didn't even draw a bill of indictment.

So I do not consider those two instances attempts to indict anybody.

Now, does not the Civil Rights Act of 1957, which is now embodied in title 42, section 1971, of the United States Code, give the Attorney General the authority to bring a suit at the taxpayers' expense in the name of the United States, in any district court where any persons are wrongfully deprived of their right to vote by any State official?

Attorney General KENNEDY. That is correct.

Senator ERVIN. And those cases are tried before a district judge without a jury, are they not?

Attorney General KENNEDY. I believe so.

Senator ERVIN. They are equity proceedings?

Attorney General KENNEDY. Yes.

Senator ERVIN. And does not the Civil Rights Act of 1960, which is set out in Public Law 86-449, amended the Civil Rights Act of 1957 to say that wherever the Federal judge, sitting in one of these equity cases brought by the Attorney General at the expense of the taxpayer, finds that the denial of the right to vote was pursuant to a practice or a pattern, the Federal judge has the discretionary power to appoint voting referees who will pass upon the qualifications of the voters?

Attorney General KENNEDY. That is correct.

Senator ERVIN. And this law also contains the very unusual provision that the testimony on the literacy tests can be taken by a voting referee in the absence of the defendant, in an ex parte proceeding, and that when the case is tried before the judge, on an exception to the voting referees' report, the only evidence they will consider will be that evidence taken in secret ex parte proceedings by the referee?

Attorney General KENNEDY. That is correct.

Senator ERVIN. Well now, in how many counties do you figure there has been discrimination of a gross nature or of a substantial nature in this matter?

Attorney General KENNEDY. We have cases, I believe, in about 21 countries. We have evidence and information and complaints, I believe, in about 150 counties.

Senator ERVIN. You may not agree with me on this point, but I am of the opinion that the Rules of Civil Procedure in the Federal Government permit awfully sloppy types of pleadings.

Do you not think that a competent lawyer could draw a pleading in one of these cases in an hour or so?

Attorney General KENNEDY. I would think so, probably.

Senator ERVIN. The Library of Congress has advised me that there are 3,071 counties in the United States. The Civil Rights Commission does not claim that there are more than 129 counties where a bad situation exists.

I am saying this because I disagree most emphatically with the assertion that there is any need for this legislation.

I think that under these private remedies, under these criminal statutes, and under the civil rights bill, there is plenty of legislation already on the books to enforce this right. And if it be enforced under the Civil Rights Act of 1957, it can be done with a minimum of difficulty because there the judge is the one who hears the evidence. There is no jury.

And so I think the new law is absolutely unnecessary. I will just close with this statement.

We have a letter from Mr. Marshall to the effect that there have been no criminal prosecutions for voting since the passage of the 1957 Civil Rights Act.

Attorney General KENNEDY. May I make just some comments, Mr. Chairman?

Senator ERVIN. Yes.

Attorney General KENNEDY. First, on the legislation, the cases that you mentioned I think, without going into details—I was familiar with a good number of those, and I think that they all can be distinguished. The ones with which I am familiar can be distinguished from what we are suggesting here as far as legislation goes.

Our brief that we submitted goes into some detail on this matter, and I hope that that will be looked at.

We talk about the fact that some of these things have not been done for 100 or 170 years, and I think that, really, is a reflection on it; that in 1962, in the United States, individuals are being denied the right, the very basic right, to register in an election and to vote.

Now, I do not think that there is anything we are going to be able to say—we believe in the Constitution of the United States—we are not going to be able to sell that idea here in the United States and go abroad, and to the United Nations, or to any of these other countries, Mr. Chairman, and say that we have a constitution and every man is created equal; everybody is alike; everybody has equal opportunity, and deny hundreds of thousands of our fellow citizens the right to register and to vote in an election.

I do not think we are in very good shape.

Now, you can say that we can bring these individual cases and we can bring individual cases and we have brought a large number of cases and we made a great number of investigations over the period of the last 14 months. The number has increased drastically. But that still is not the answer, Mr. Chairman.

These circumstances are happening a hundred years after the War Between the States, and these individuals, and these individuals are still not allowed to vote because they happen to be Negroes. I do not think that we need and have to accept that.

We are suggesting some legislation which will greatly improve the situation.

You talk about one of these cases that you say we just go in and sign a person's name in blank and bring action. I do not think that the Department of Justice or the Federal Government should proceed in that fashion. We make long investigations, Mr. Chairman, to determine the facts, and the Federal Bureau of Investigation goes into each one of these counties.

Often it is very, very difficult. One of these cases took 180 witnesses. Once we finally make the investigation, make the study, then we are apt to find other difficulties and problems.

If an individual, who is a college professor, goes in and is denied the right to register or to vote in an election, you are not going to get anybody else in that county to go in and try to register, and the result is that you have got many of these counties in the United States who have large numbers of Negroes where only 3, 4, or 5 percent or less

of the Negroes are registered to vote, and the reason is because over an extended period of time they have been intimidated in one fashion or another.

Now, we are suggesting and recommending legislation which will greatly improve that situation; that an individual—the way they have been denied the right to vote is to say that they are not literate, and because the registrar does not like Negroes, he sits across the table and no matter whether the fellow finishes college or whether he is a university professor, he says he is not literate, and there is nothing he can do.

Frequently you say they can bring cases of their own. Frequently they do not have those kinds of funds to fight State or the whole county.

What we are doing, and I do not think that it is so horrendous, Mr. Chairman, is to say a person should be considered literate if he has finished the sixth grade.

Now, we have a discussion or have had a discussion here for most of the morning in connection with whether somebody could have gone through the sixth grade and still not be literate. That might possibly happen. That might possibly happen, but you and I were on committees that investigated corruption in labor and management affairs.

We found relatively small percentage of the labor organization which were corrupt, but the legislation was passed in the Senate and the House of Representatives to require all labor organizations to file financial reports with the Department of Labor, not because a lot of them were found to be corrupt, but only a small percentage.

It may be in relatively few counties, Mr. Chairman, but hundreds and hundreds of thousands of Negroes are being denied the right to register and vote in the United States in 1962 because they are Negroes.

Now, I think that we all, those of us who have the responsibility in this field, we in the executive branch of the Government and the Department of Justice and you, here in the Senate of the United States, need to take some action to remedy that situation.

Senator ERVIN. Well, we did pass some legislation about labor, but there is a fundamental difference between that legislation and the pending bills.

It did not take anybody's rights away from them and it did not provide any punishment for them or deprive them of any of their powers as long as they obeyed those laws.

I agree with you that every American citizen, of every race, is entitled to his constitutional rights, whatever they may be, but I do disagree with the fundamental things in these bills.

I doubt whether a clearer violation of the constitutional privileges could be suggested in a bill, as I view it. I think it is comparatively mild as to what could be suggested. I am in favor of everybody having his constitutional rights, but I am in favor of securing them by constitutional methods. This is my honest judgment. Any bill, in which the Federal Government attempts to prescribe what shall be a literacy test, is unconstitutional because the power to prescribe literacy tests belongs to the States, and because there is nothing in the operating part of this bill which confines this to a nonwhite.

Attorney General KENNEDY. Thank you, Mr. Chairman.

Senator ERVIN. Excuse me for being so lengthy.

Attorney General KENNEDY. I appreciate it, Mr. Chairman.

Senator KEATING. Mr. Chairman, I do not want to belabor the constitutional argument which you have been having with the Attorney General.

I do simply want to say this: In my opinion the States have the right to establish qualifications for voting.

Attorney General KENNEDY. I agree.

Senator KEATING. That is clear under article I, section 2. However, that is not the only provision of the Constitution with regard to voting. The 14th and 15th amendments are just as much a part of the Constitution as the original article I, section 2. And the right of the States to establish qualifications must be exercised in conformity with other constitutional provisions.

The duty of Congress to enforce the command of the 15th amendment against discrimination on the grounds of race, color, or previous condition of servitude, is just as plain, just as definite, and just as firm, as the right of the States to determine the qualifications, in the first instance.

Discrimination at the polling place not only is abhorrent, it is in violation of the Constitution, and what some of us are trying to do is to breathe life into all of the provisions of the fundamental law.

And I reject any suggestion that we are, in any way, undermining any one of the provisions of the U.S. Constitution by seeking to carry out some or, indeed, all of the recommendations made by the Civil Rights Commission. On the contrary, I believe the Constitution will be strengthened, not weakened, if we take the action necessary to enforce its provisions.

Mr. Attorney General, Dean Griswold of the Civil Rights Commission who, in his testimony, said that the 14th and 15th amendments, and I quote him—

secure the right to vote free from discrimination in State as well as Federal elections.

Now, there may be considerations of policy, but let me ask you, is there any doubt in your mind that S. 2750, if it were broadened to include State elections as well as Federal would be constitutional?

Attorney General KENNEDY. Senator, I think there is more of the constitutional question if you include State elections as well as Federal elections.

For instance, article 1, section 4, would apply only to a Federal election. It does not apply to a State election.

You have the—

Senator KEATING. Article 1, section 4 does what?

Attorney General KENNEDY. It only applies to Federal elections. It would not apply to State elections.

You have it supported by the 14th and 15th amendments, but I do not think that there is as strong a case on the question of the constitutionality if you applied this only to Federal elections.

And it was on that basis, our real effort to try to have this enacted into law with the minimum of controversy, that we have suggested it in its present form.

Senator KEATING. Well, the discrimination to which you referred in certain States is present with regard to Federal and State elections, is it not?

Attorney General KENNEDY. I think that is correct; yes, Senator.

Senator KEATING. Your principal basis for the claim of constitutionality of this legislation is the 14th and 15th amendments?

Attorney General KENNEDY. That is correct.

Senator KEATING. But you sort of throw in article I, section 4.

Attorney General KENNEDY. I do not throw it in. I use it. It is there.

I think that it helps and assists, but, as I say, first, I do not think that the argument for State elections is as strong as it is for Federal elections.

And, No. 2, we are very anxious to get the legislation passed, and I think that that would raise enough more questions so that it would be difficult. And so—

Senator KEATING. Well, do you think that there would be more opposition on the part of those who oppose this legislation, if it applied to all of the elections rather than just to their elections for Federal officials?

Attorney General KENNEDY. I think it would be more difficult, Senator. We considered that very carefully and came to the conclusion that it would be more difficult.

As a practical matter, discussions back and forth, it is more difficult when the Federal Government is legislating as far as the State elections. I think it raises more problems and we felt that we had the best possible opportunity.

We have a more unique responsibility at the Federal level for Federal elections. I think that is quite clear.

And so we felt that, putting all of that together, that we would be advised in suggesting that we restrict it to Federal elections.

Senator KEATING. I am raising these questions because, as you know, I introduced legislation in line with the Commission's recommendations.

Attorney General KENNEDY. Yes.

Senator KEATING. Which applies to both State and Federal elections.

I may say, if it is not already apparent to you, that there is already massive resistance to S. 2750 in some quarters.

I do not think that is an exaggeration, and I just question how much more massive you can get than "massive."

In other words, I have reservations about your view that this would encounter any great opposition if it applied to all elections covered by the 15th amendment rather than just to Federal elections. One trouble is that in many States the ballots for the Federal offices and the State offices are all on the same ballot. It would require State legislation in some of these States, and they would be required to enact the legislation, I believe, if this law was passed, to change their ballots.

But that is a matter of policy, and it is perfectly clear in my mind, as it apparently was in Dean Griswold's, the Commissioner of the Civil Rights Commission, that there is constitutional authority to lay down an objective test of literacy in order to prevent violations of the 14th and 15th amendments.

Attorney General KENNEDY. Senator, I feel also that it is constitutional.

I do feel, as I say, that it makes a more difficult case, a more difficult constitutional case.

I feel that the Federal Government has this unique responsibility as far as Federal elections, so that we should deal with that matter and, thirdly, in my judgment, there would be less opposition, but I think that you would probably be in a better position to judge that than I would.

That was the decision that I made. Maybe, perhaps I am wrong about it.

Senator KEATING. Well, as you know, I am very sympathetic to your position in favor of this legislation and I want to be helpful in every way I can in getting an effective bill enacted.

Attorney General KENNEDY. I appreciate that.

Senator KEATING. Dean Griswold also pointed out that the Commission had made several other recommendations in the field of voting apart from that dealing with literacy tests. S. 2750 is limited to the literacy test. Again we are faced with the question of policy as to what should be done, but are there any of the other recommendations of the Commission in the field of voting rights with which you would have any question as to their constitutionality?

Attorney General KENNEDY. Well, I would have to examine them, Senator. I have not gone through all of them.

Senator KEATING. I think it would be helpful to us if you could provide us a memorandum in regard to the constitutionality of the specific recommendations of the Commission in the field of voting rights, because undoubtedly amendments will be offered to include some or all of them. Your help on this question of constitutionality will be very much appreciated.

Attorney General KENNEDY. For instance, as far as policy is concerned—but you just want it on the question of constitutionality?

Senator KEATING. No; I think it would be helpful to have your views as to the policy involved also.

You have not made a report on that issue yet?

Attorney General KENNEDY. No. For instance, I think that the Civil Rights Commission suggested and recommended that we do away with all literacy tests, at least four out of the six members did, and I would be opposed to that.

I think in all of these matters we have to keep in mind what is possible to enact, and that it is better to suggest and recommend legislation that is possible of enactment which will do some good and not merely go through the motions.

And so that is why this legislation has been recommended.

Senator KEATING. Well, for the record, I believe the Commission was unanimous in recommending completion of the sixth grade as a test of literacy.

Attorney General KENNEDY. That is it. That was unanimous, and four out of the six recommended that all literacy tests be abandoned. The majority did.

And that was the question that was raised with me over in the House committee.

Senator KEATING. Well, I was particularly interested in it. I like the sixth grade test. I think that is fine.

I am also interested, however, in the other recommendations in the field of voting, and I think it would be helpful to us to have a letter from you, not only on the constitutionality principles involved, but also your views on the policy.

Attorney General KENNEDY. Fine.

Senator KEATING. I assume when you say that you prefer limiting the bill to the provisions of S. 2750 you are not thereby, by any means, suggesting that if Congress saw fit to enlarge the provisions of S. 2750 that you would recommend a veto to the President.

Attorney General KENNEDY. That is correct, assuming it follows along the lines that we have been discussing today.

Senator KEATING. Now, may I pursue that a little further?

As you know, a number of Senators have joined in introducing legislation which would carry out all of the Commission's recommendations not only in the field of voting which we have already covered, but also with regard to education, housing, employment, and the administration of justice.

Now, if the Congress saw fit to amend S. 2750, in accordance with the recommendations of the Commission on Civil Rights, and broaden the bill to cover other fields than voting, again, you are not so wedded to S. 2750 that you would feel that you would have to recommend a veto by the President in that regard?

Attorney General KENNEDY. I would just say, Senator, though, that what we are anxious to do is to get something accomplished, and I would hate to see a great number of amendments and additions made to this bill which would make it completely impossible for passage.

Although it could be said an effort was made, I would rather have an effort made that was successful than a larger effort made that was unsuccessful.

Senator KEATING. I would rather see an enactment like this than no enactment at all.

You and I share that view, but I do feel, in all candor, that it is meeting only a part of one of the problems which we have.

Literacy is not the only device used to disenfranchise Negroes in the field of voting, as you would readily admit, I am sure.

There are others, are there not?

Attorney General KENNEDY. That is correct.

Senator KEATING. I am simply asking whether you would feel so confined to this literacy bill that if the Congress saw fit to enact broader legislation, and I do not see much difference in the difficulty in enacting this bill and a somewhat broadened bill—there may be a question of degree—you would not feel that you had to recommend a veto to the President if the Congress did broaden this bill.

Attorney General KENNEDY. That is correct. I mean, obviously, it would depend upon what the provisions are but, again, on the basis of what we are discussing here today, I do not see where there would be a problem.

Senator ERVIN. Well, there were 5 pounds of those provisions thrown at me the last time we had legislation in this field, and 5 pounds, I think, would outweigh the Constitution of the United States.

Senator KEATING. Well, I submit, Mr. Chairman, the bill of which I am the author. Here it is.

I would guess that it weighs less than 5 ounces.

It is probably 1 or 2 ounces. There are others, I agree, but this is the one dealing with voting.

Mr. Attorney General, have you made any estimate or do you have available any figures as to the number of citizens who would be enfranchised by the establishment of a sixth grade standard of literacy?

Attorney General KENNEDY. We have not got any figures although we know it is a very large number, Senator, from the Bureau of the Census.

Senator KEATING. Since we are dealing with this question of voting, I want to ask you about a related subject, with regard to the recent Supreme Court decision, holding that the drawing of arbitrary election lists may deny the protection of the laws to many Americans by diluting the value of their votes.

This decision is expected to lead to a great deal of litigation.

Has the Department of Justice decided, or does it have any plans, to intervene in any of these cases where that question is involved?

Attorney General KENNEDY. No decision has been reached on it, Senator.

Senator KEATING. That is all, Mr. Chairman.

Senator ERVIN. Mr. Creech.

Mr. CREECH. Mr. Attorney General, in your colloquy earlier with the chairman, you said that if a bill were offered setting qualifications, that it would be unconstitutional.

Just now in your conversation with Senator Keating you have said that you do not think that the argument for legislation as to State elections is as strong as the one for Federal elections.

Sir, I should like to draw your attention to the provisions of S. 2979 which state that the right of citizens of the United States to register or otherwise qualify to vote shall not be denied, abridged, or interfered with by the United States or by any State for any cause except for the following reasons, uniformly applied within the State and its political subdivisions to all persons.

The four reasons given are these, sir:

- (1) Inability to meet reasonable age requirements;
- (2) Inability to meet reasonable requirements as to length of residence within the State and its political subdivisions;
- (3) Legal confinement at the time of the election or registration; and
- (4) Conviction of a felony.

Now, sir, this bill would apply to both State and Federal elections, and it would change the laws, or affect the laws and the constitutions of some 45 of the 50 States.

Now, inasmuch as the memorandum on the constitutionality of S. 2750, which you have presented to the subcommittee, indicates that you feel that the Congress, would have no authority to legislate as to State elections, and inasmuch as the argument which you have given here indicates that—

Attorney General KENNEDY. Wait a minute.

Mr. CREECH. You brought out that they do have the authority, under article I, section 4, as to the time, place and manner of regulating elections in Federal elections.

You make that very clear, but inasmuch as you indicate that there is no provision in the Constitution for regulating State elections, would you feel, sir, that the provisions here would be constitutional?

Attorney General KENNEDY. I do not think I said in the brief that I submitted that there was nothing in the Constitution dealing with State elections.

Mr. CREECH. No.

Attorney General KENNEDY. I think that, as I replied to Senator Keating, under the 14th and the 15th amendments, the Federal Government has some authority in this field.

I do not think that the authority is as broad as it is in Federal elections, and as far as specific legislation is concerned, I would have very serious—the Federal Government does have that authority, and the bill would be constitutional.

As you read it to me there and, as I am somewhat familiar with that piece of legislation, I would have grave doubts about the constitutionality of that particular piece of legislation which abolishes all literacy tests, as I understand it.

Mr. CREECH. Now, sir, in your own State of Massachusetts—

Attorney General KENNEDY. But I do think that it would be possible—

Senator KEATING. Is counsel referring to the bill I have offered?

Mr. CREECH. Yes, sir.

Senator KEATING. Well, that does not abolish all—

Attorney General KENNEDY. Well, as I say, on the premise—

Mr. CREECH. These are the sole criteria which could be applied.

Senator KEATING. It requires successful completion of six or more grades of formal education.

It says if they finish those they are able to vote.

It is almost identical in that regard to an article in the provision of the Attorney General's bill.

Mr. CREECH. I am reading from the bill, page 2, and it says, except as provided with regard to section 3 of it, which pertains to completion of the sixth grade as the fulfillment of the literacy requirement, these would be the only other criteria which the States could accept.

Senator KEATING. Well, section 3 is the provision relating to literacy tests.

Mr. CREECH. That is true; and then, in effect, it says that 45 of the 50 other States, sir, would have to change their laws or their constitutions to comply. For instance, under this bill, in order to disenfranchise an insane person, he would have to be under legal confinement at the time of the election or registration.

There are provisions in a number of State constitutions, and State statutes, which exclude from voting idiots and the insane, without reference to their confinement. There are provisions which disenfranchise those individuals who have received dishonorable discharges from the service.

Senator KEATING. Well, that was all covered in Dean Griswold's testimony, and he agreed that some other standards might be reasonable.

Mr. CREECH. The States could not exclude such individuals under this proposal sir. I was asking the Attorney General about the provisions of the bill.

Senator KEATING. Well, of course it is subject to amendment.

Mr. CREECH. Sir, your own State of Massachusetts, would be one of those States affected, if this bill were enacted. Of course, as Senator Keating has said, and as we all know, any bill can be amended; it does not necessarily mean that it is going to be reported out or enacted into law in the manner it is drawn.

But your own State of Massachusetts, of course, has a literacy requirement for voting, and other requirements as well. The supreme court of your State said, some 100 years ago, and this was quoted in the recent unanimous decision of the Supreme Court in the *Lassiter* case, in 1959, that the literacy test was designed to insure an independent and intelligent exercise of the right of suffrage.

Now, sir, I gather from what you have said this morning that you perceive no objection to literacy tests per se.

Your objection is to literacy tests, when they are used arbitrarily—

Attorney General KENNEDY. That is correct.

Mr. CREECH (continuing). For the purpose of disenfranchising individuals. Is that correct, sir?

Attorney General KENNEDY. That is correct. And I think that is the major reason we do not suggest the abolishment of all literacy tests.

I think that a State, if it determines that it wants to use or utilize a literacy test, should certainly be permitted to do so.

Mr. CREECH. Now, sir, on page 2 of your statement you cite a number of instances in which Negro citizens in certain parts of the country were denied registration because of their statements in filling out application blanks.

In your view, sir, would S. 2750 remedy this situation?

Attorney General KENNEDY. Excuse me?

Mr. CREECH. In your view, sir, would S. 2750, the administration bill, remedy the situation which you describe on page 2 of your statement with regard to Negroes and, for that matter, any individuals, denied registration because of mistakes made in filling out application blanks?

Attorney General KENNEDY. It would.

Mr. CREECH. It would?

Attorney General KENNEDY. It would apply.

Mr. CREECH. In your view it would remedy the situation?

Attorney General KENNEDY. Yes.

Mr. CREECH. Would you care to elaborate on that, sir?

Attorney General KENNEDY. Well, a group came in to see me yesterday, Mr. Counsel, for instance, where they had an application blank, which has been used in thousands and thousands of cases, to deny the right to register.

They have the application blank and one of the questions is the years, months, and days since your birth. They have a school that they set up to help these people register, to help them fill out their application blanks.

They go down there and they attend or find out how they are to fill out the application blanks. They walk a block. Then they go into the registrar, fill it out, as they had filled it out just a few minutes before, and they are denied the right to register.

And that has happened in thousands and thousands of cases.

The use of the application blank is an arbitrary test and would be outlawed by this legislation.

Mr. CREECH. Now, sir, on page 3 of your statement, you have cited authorities of some 13 States which——

Senator KEATING. Mr. Chairman, before counsel leaves that, and apparently he is going on to a somewhat different line of questioning, I would like to say this.

As I understand it, Mr. Attorney General, you feel that filling out blanks was covered by that part of your bill which said, "Deprivation of rights of voting shall exclude but shall not be limited to the application to any person of standards or procedures more stringent than are applied to others similarly situated."

Attorney General KENNEDY. That is correct.

Senator KEATING. In other words, while this has been spoken of as a literacy bill it does go further than literacy?

Attorney General KENNEDY. Yes, and I think, again, the key phrase is the performance in any examination.

Where the application blank is used as an examination, Senator, it would deal with that problem.

Senator KEATING. Well now, I am not sure I fully understand. In your prepared statement, you referred to persons who were denied registration because they inserted a phrase "since birth" or "all my life" in a blank to indicate the length of their residence in the county. Now, does that have anything to do with any literacy requirement?

Attorney General KENNEDY. Well, the application form was used as an examination or a test. These application forms——

Senator KEATING. Oh, I see. In other words, these were cases where they used these to show that the person was not literate?

Attorney General KENNEDY. Well——

Senator KEATING. That is by the mistakes that they made?

Attorney General KENNEDY. Well, it is a test or an examination which is used and has been used flagrantly to deny the people the right to register.

For instance, you could obtain a copy of the application form. You are not allowed, for instance, to fill it out before and bring it in. If it was just a question of the information that the registrar wanted or an identification of the individual, obviously, you would be permitted to have some help and assistance in filling it out or fill it out even before you came in, but it is not used for that purpose.

And, as I say, we have had a number of examples where large numbers of people have been denied the right to register.

Senator KEATING. Subsection 1 of section 2, in the bill would cover——

Attorney General KENNEDY. Yes.

Senator KEATING (continuing). A number of cases which were not covered——

Attorney General KENNEDY. That is right.

Senator KEATING (continuing). In subsection 2 of section 2 of the bill?

Attorney General KENNEDY. Yes; you are correct.

Senator KEATING. If they said, "you stand in a single line" and the Negroes were standing, husband and wife together, and the white

people were standing as husband and wife together, and they enforced it as to the Negroes and deprived them of registration, but did not as to the whites, it would be covered by subsection 1

Attorney General KENNEDY. That is correct. That is correct.

Senator KEATING. Now, there is another technique which has disenfranchised Negroes in a great many cases, according to the findings of the Civil Rights Commission, and that is arbitrary inaction, not affirmative action, but arbitrary inaction.

Some examples are discussed in the Commission's reports such as "finding the registrar" and the so-called voucher system.

How would you feel about enlarging the provisions of subsection 1 to cover, by appropriate language, arbitrary inaction where there was duty to act as well as arbitrary action which, I envision, is being covered by subsection 1 now?

Attorney General KENNEDY. Senator, those suits are far easier to bring, the voucher suits, and the inaction suits are far easier to bring than these other kinds of suits.

We brought three or four under the voucher and the one in Macon County, Ala., I believe was in connection with the inaction.

Our problems are not as great in this field as they are in the area that we have suggested in the legislation.

I think that the legislation that was passed in 1957—

Senator KEATING. The arbitrary inaction is easier to prove than the arbitrary action; is that it?

Attorney General KENNEDY. That is correct. If just the registrar does not show up and does not make himself available we have an easier time proving it in that field.

Senator KEATING. Well, since this area of arbitrary inaction, where there is a duty to act is covered by S. 2979, if it is agreeable to you and the chairman, in connection with the report of the Department, it might be well to comment on S. 2979 which is intended to embody all of the recommendations of the Civil Rights Commission, and to cover the points that you are making in a letter keyed to that bill.

Attorney General KENNEDY. I will be glad to.

Mr. CREECH. Sir, you have said on page 3 of your statement that responsible authorities in some 13 States have indicated there would be no conflict between their literacy requirements, and the provisions of S. 2750.

I wonder, sir, if the 13 which you enumerate here were the only States which you queried in your survey?

Attorney General KENNEDY. Yes; they are.

Mr. CREECH. They are? And also, sir, I wonder if you would care to identify, for the record, the authorities who supplied you with this information?

Attorney General KENNEDY. Shall I furnish it in a letter to the chairman?

Senator ERVIN. That will be all right.

Mr. CREECH. Because we have received statements, sir, from the attorneys general of a number of States, including some of those which are listed, which indicate that they feel the bill is unconstitutional.

I think it would be good to clarify it for the record.

Attorney General KENNEDY. I will be glad to do it.

Mr. CREECH. Thank you.

Senator KEATING. Well, attorneys general do not always agree with the administration, do they?

Attorney General KENNEDY. No; I found that out lately, Senator.

Mr. CREECH. Sir, on page 4 of your statement you say that the existing laws are inadequate to protect the rights of voters.

The chairman read earlier an excerpt from a letter which he received from Mr. Marshall to the effect that there have been no prosecutions under the Civil Rights Act since the passage of the Civil Rights Act in 1957; no criminal prosecutions.

Now, in your opinion, sir, has the Department had sufficient time, under the existing civil rights legislation, to make an adequate determination as to whether the existing laws are broad enough to protect the rights of the voters?

Attorney General KENNEDY. I think we have; yes.

We have, as I said at the beginning. We did not come in and make any suggestions or recommendations on legislation in the beginning until we had time at the Department of Justice to work with these matters. And I do not think there is any question that, based on the kind of information that we have available now, the investigations that have been conducted by the FBI, and the work that has been done within the Department, but that there is an indication that legislation is necessary in this field.

And that is why I am here today.

Mr. CREECH. Sir, on the same page, you indicate that you have no personal doubt as to the validity of the bill, S. 2750, and that you feel there is no question that there are widespread deprivations of the right to vote.

Then, you go on to say, sir, that the question is not whether this bill is valid but whether it would correct the situation.

Would you elaborate on that statement, sir?

Attorney General KENNEDY. In my judgment, it is valid, so that is not the question.

Mr. CREECH. I see. Thank you.

Attorney General KENNEDY. I mean I am the one speaking. This is my statement. I do not think that the chairman would make the same statement.

Mr. CREECH. Now, sir, there are no indications in S. 2750 as to how the provision relating to completion of the sixth grade of education would be enforced.

By that I mean, how the individual would satisfy the registrar that he had, in fact, completed 6 years of school.

In view of the lack of standards in the bill in this regard, could you feel, sir, that this bill would provide significant help to individuals attempting to register who are encountering opposition from registrars?

Attorney General KENNEDY. Well, I think it would. Again, it is going to put the final responsibility at the local level.

If an arbitrary procedure is followed, and there appears to be discrimination against one group or another, we would have to take another look at it, but I think that we can rely on it. I think that this is satisfactory in that regard.

Obviously, as I say, it is going to be up to the local authorities to determine or to make a decision of what constitutes a sixth-grade education in a particular State.

Mr. CREECH. Actually, sir, from your statement I gather that you do not object to literacy tests per se. You object to their being administered in such a way as to disenfranchise individuals who might otherwise be permitted to vote?

Attorney General KENNEDY. Yes.

Mr. CREECH. I wonder, sir, if, in this case, you are providing any new remedy for the individual.

If it is actually administration of the existing laws that you are objecting to, would there not be the same problems under S. 2750?

Attorney General KENNEDY. I think it is far easier to determine or make a decision whether a person has a sixth-grade education than it is on this whole question of when the registrar makes a decision, a subjective decision, that a particular individual is not literate.

We have a more difficult time, obviously, in these kinds of cases than we do if you are a Negro and a white child or individual going to the same school, and you both finish the same amount of grades in the same area, and if both miss the same amounts of classes and one is allowed to register and the other is not, because he has not finished the sixth grade, that is very easy to prove, I would say.

I do not think we would have any difficulty with that.

Mr. CREECH. Sir, is it not true that there are a number of people in this country who speak languages other than English and Spanish who might also be well qualified to vote?

Attorney General KENNEDY. There are.

Mr. CREECH. There are? Well, now, do you think, sir, if a State were to enact such a law as S. 2750, that it would be denying to its other citizens, who speak foreign languages other than Spanish, equal protection of the laws under the 14th amendment?

Attorney General KENNEDY. No; I do not, and the reason is I think that we have a special responsibility, as far as Puerto Rico is concerned.

First, Puerto Rico comes under our control, and then in the Jones Act, that was passed in 1917, it gave the Puerto Ricans certain rights, making them citizens, giving them the right to vote in elections in any State in the Union, Spanish being the language of Puerto Rico.

But I think we have a particular and specific responsibility to them.

As far as other individuals are concerned, who come here from foreign lands, who attend schools and learn English—at the time Spanish happens to be the native language of Puerto Rico and I think that this has made it particularly difficult for them to participate in elections particularly in the State of New York.

Mr. CREECH. Yes, but, of course, this bill, as you have said earlier, would apply across the board to all the States, would it not, sir?

Attorney General KENNEDY. Dealing with Puerto Ricans.

Mr. CREECH. Well, actually, it deals with the Spanish language requirement if an individual has completed 6 years of school—

Attorney General KENNEDY. In Puerto Rico.

Mr. CREECH. Yes. Now, sir, the Supreme Court has held in its decisions in *Hurd v. Hodge* and *Bolling v. Sharp*, that equal protection is implicit in the due process of the fifth amendment.

Accordingly, is it your view that if Congress enacted this bill, it would not be violating the fifth amendment?

Attorney General KENNEDY. That is correct.

Mr. CREECH. For the reasons that you have just stated?

Attorney General KENNEDY. That is correct.

Mr. CREECH. Well, sir, if this bill should be enacted, would it be your view that the States should print the ballots in both English and Spanish?

Attorney General KENNEDY. I do not think it would be necessary.

Mr. CREECH. Sir, on page 5 of your statement you said that the bill is concerned solely with a fair, nondiscriminatory manner of measuring qualifications of Federal voters under the State law.

Attorney General KENNEDY. That is correct.

Mr. CREECH. Now, sir, where in the Constitution is the Congress given the power to measure the qualifications of the voters?

Attorney General KENNEDY. I think it is quite clear from the Constitution that it states, as I have said to the chairman and in which, I think he agreed, that the States are the one who set qualifications.

Under the Constitution, under article I, section 4, and article I, section 8, under the 14th and 15th amendments, we have certain responsibilities to insure that an individual is not discriminated against in his efforts to register and vote in elections.

Congress—it is incumbent upon Congress to pass the necessary legislation to insure that an individual is not discriminated against.

Individuals are being discriminated against by procedures that I have outlined today in my statement and otherwise and, therefore, it is incumbent upon Congress to pass legislation to deal with this problem.

Mr. CREECH. Thank you.

Senator ERVIN. Mr. Attorney General, we want to thank you and Mr. Marshall for making your appearance before the subcommittee today and giving us the benefit of your views on this legislation.

Attorney General KENNEDY. And I want to thank you, Mr. Chairman, and thank you for your courtesy and for the courtesy of the members of the committee.

Senator ERVIN. I think that all qualified voters of all races should be permitted to register and vote frequently.

In the South, matters of discrimination do a twofold injustice to the person wronged and does also an injustice to those Members of the Senate and the House who entertain my views, because it compels us to do a lot of thinking, as we see it—

Attorney General KENNEDY. Yes.

Senator ERVIN (continuing). To save the Constitution for all Americans of all generations.

Attorney General KENNEDY. That is right. Thank you, Senator. (The brief filed by the Attorney General follows:)

CONSTITUTIONALITY OF S. 2750

The facts calling for the exercise of congressional power under S. 2750 are set forth in the statements of the Attorney General; in the findings and unanimous recommendations of the Civil Rights Commission; and in other statements and materials. This memorandum discusses the constitutional bases for that exercise of power in the context of those facts.

Under the bill the States would be prohibited from denying the right to vote for Federal officials on account of performance in any educational-type examination (whether for literacy or otherwise) to any person who is otherwise qualified by law, has not been adjudged incompetent, and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

Because separate legal problems are involved, this memorandum deals separately with (1) congressional authority to prohibit denials of the right to vote to citizens who have completed the sixth grade in a school in a State or territory or the District of Columbia, and (2) its authority to prohibit denials to citizens who have completed the sixth grade in a school in Puerto Rico. Part I is concerned with the general application of the bill; part II discusses it as applied to citizens who have completed six grades in a Puerto Rican school.

THE BILL AS IT APPLIES TO CITIZENS WHO HAVE COMPLETED SIX GRADES IN A SCHOOL IN A STATE OR TERRITORY OR THE DISTRICT OF COLUMBIA

The Civil Rights Commission has unanimously found that literacy and interpretation tests have been widely employed to disenfranchise Negroes. It has reported that (Report of the United States Commission on Civil Rights on Voting, 1961, p. 137):

"A common technique of discrimination against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of 'good character.'"

To remedy this situation the Commission unanimously recommended (report, at 141):

"That Congress enact legislation providing that in all elections in which, under State law, a 'literacy' test, an 'understanding' or 'interpretation' test, or an 'educational test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education."

As it applies to elections for Federal officials, this unanimous recommendation of the Commission is embodied in S. 2750.

Although no language in the Constitution expressly confers such authority, the courts have held that the States have the power to prescribe reasonable qualifications for voting in State and Federal elections. *Lassiter v. Northampton Election Board* (360 U.S. 45, 60 (1959)); *Breedlove v. Suttles* (302 U.S. 277 (1937)); *Pope v. Williams* (193 U.S. 621, 633 (1904)). But no court has held that, acting pursuant to its delegated powers, Congress cannot restrict the States with respect to the qualifications they impose or the manner of testing those qualifications. There are at least four constitutional sources of such congressional power: Section 2 of the 15th amendment; section 5 of the 14th amendment; article I, section 4; and the implied power of Congress to protect the purity of Federal elections. The article I, section 4 power in terms extends only to congressional elections; the implied power of Congress extends to all Federal elections; and the 14th and 15th amendments are adequate to reach both State and Federal elections. S. 2750 extends only to Federal elections, and it is therefore not necessary to discuss congressional power to deal with State elections as such.

A. THE 15TH AMENDMENT.

The 15th amendment prohibits the racially discriminatory administration of State voting laws, even if such laws are valid on their face. *United States v. Raines* (362 U.S. 17 (1960)); *United States v. Thomas* (180 F. Supp. 10 (E.D. La., 1960)), *affirmed* (362 U.S. 58 (1960)); see *Davis v. Schnell* (81 F. Supp. 872 (S.D. Ala., 1949)), *affirmed* (336 U.S. 933). It also prohibits "contrivances by a State to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color * * *"; it "nullifies sophisticated as well as simple-minded modes of discrimination"; it forbids "onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race" (*Lane v. Wilson*, 307 U.S. 268, 275 (1939); see also *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915)); and it vitates measures which have the "inevitable effect" of disenfranchising Negroes. *Gomillion*

v. *Lightfoot* (364 U.S. 339, 342 (1960)). Where there is a purpose or effect of discrimination, the amendment forbids qualification laws which vest broad discretion in State voting officials, including laws which permit State officials to determine whether an applicant can understand or explain constitutional or other provisions. *Davis v. Schnell*, *supra*.

Under section 2 of the 15th amendment Congress is vested with the power to enact "appropriate legislation" to enforce the amendment. This power is to be interpreted broadly, and includes the enactment of measures reasonably adapted to counteract discriminatory devices. See e.g., *United States v. Raines* (362 U.S. 17, 25 (1960)); *Hannah v. Larche* (363 U.S. 420, 452 (1960)).

The measure of congressional power to enforce prohibitory constitutional amendments is illustrated by *James Everard Breweries v. Day*, 265 U.S. 545 (1924). There, the Supreme Court held that, although the 18th amendment in terms prohibited only the manufacture and sale of intoxicating liquors for beverage purposes, Congress could, under the "appropriate legislation" clause of that amendment, bar the prescription of intoxicating liquor for medicinal purposes, for the sole reason that prohibiting traffic in the latter was reasonably adapted to enforcing the terms of the amendment. The Court said (265 U.S. at 561):

"The opportunity to manufacture, sell, and prescribe intoxicating malt liquors for 'medicinal purposes,' opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges, and artifices; aids evasion; and thereby and to that extent hampers and obstructs the enforcement of the 18th amendment."

See also *Ruppert v. Caffey*, 251 U.S. 264 (1920); *United States v. Darby*, 312 U.S. 100, 121 (1941); *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Westfall v. United States*, 274 U.S. 250, 258-259 (1927).

This means that Congress, acting under its power to enforce provisions such as those of the 18th or the 15th amendment by "appropriate legislation," is not limited to outlawing practices which are forbidden by the terms of the provisions themselves. It may also do whatever is reasonably necessary to remove obstructions to fulfillment of the purposes of the provisions. Congress may restrict the employment of literacy or other qualifying tests, even though on their face they do not violate the amendment, if it deems this necessary effectively to eliminate their use in a manner forbidden by the amendment.

The findings of the Commission on Civil Rights, and those contained in section 1 of S. 2750, make clear that the adoption of objective standards is necessary in order to enforce in an effective way the prohibitions of the 15th amendment. By substituting an objective standard for vague and subjective tests, the bill would strike both at tests which on their face vest excessive and uncontrolled discretion in State registrars and at tests (or other requirements, such as the completion of forms which are treated as tests) which have been administered in a discriminatory manner.

B. THE 14TH AMENDMENT

(1) *The equal protection clause*

The actions of voting registrars in applying literacy and other qualification tests so as to disenfranchise Negroes, while applying the same tests to whites in a different manner, constitute a denial of the equal protection of the laws guaranteed by the 14th amendment. See, e.g., *Davis v. Schnell*, *supra*. See also *Cooper v. Aaron*, 358 U.S. 1 (1958); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Rice v. Elmore*, 165 F. 2d 387, 392 (C. A. 4, 1947). These actions are a proper subject of congressional power under section 5 of the amendment, which grants Congress authority to enforce the provisions of the amendment by "appropriate legislation." *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1879). The scope of congressional powers under section 5 has been broadly defined by the Supreme Court. Thus, in *Ex parte Virginia*, the Court said (100 U.S. at 345-346):

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws, against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

The power vested in Congress by section 5 of the 14th amendment is like its power under the enforcement clause of the 18th amendment, which was sustained in *James Everard Breweries v. Day*, 265 U.S. 545 (1924), discussed above.

It is sufficient to support restrictions upon qualification tests which may be valid on their face if Congress finds such action appropriate or necessary effectively to eliminate the discriminatory application of the tests.

(2) *The privileges and immunities clause*

In *Twinning v. New Jersey*, 211 U.S. 78, 97 (1908), the Supreme Court said that " * * * among the rights and privileges of national citizenship recognized by this Court are * * * the right to vote for national officers, *Ex parte Farrow*, 110 U.S. 651 * * *." See also *United States v. Thomas*, 180 F. Supp. 10 (E.D. La. 1960), affirmed 362 U.S. 58 (1960). The power of Congress to enforce the provisions of the 14th amendment extends to all its provisions. It is as applicable to the privileges and immunities clause as it is to the equal protection clause. Since the bill is limited to Federal elections, the privileges and immunities clause independently supports remedial legislation such as S. 2750 to secure the right to vote.

(3) *The due process clause*

Arbitrary State tests to determine qualifications of voters in national elections are invalid under the due process clause (*Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), affirmed 336 U.S. 933 (1949)). As a privilege and immunity of national citizenship (*Twinning v. New Jersey*, *supra*) and as a right implicit in and guaranteed by the Constitution (*United States v. Classic*, 313 U.S. 290, 315 (1941) and cases cited), the right of qualified voters to vote for Federal officers cannot be denied without violating "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions * * *" (*Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)). The right to vote for such officers is therefore an aspect of "liberty" protected by the due process clause of the 14th amendment from arbitrary and unreasonable infringement by the States. By virtue of its power under section 5 of the 14th amendment, Congress may proscribe State qualification tests which are arbitrary and which for that reason violate the amendment.

Beyond that, however, Congress shares with the judiciary the power to enforce the 14th amendment (*Ex parte Virginia*, 100 U.S. 339, 345 (1879)). Upon appropriate findings, it may declare that certain State restrictions upon the exercise of the franchise (i.e., the requirement that an applicant with a sixth grade education must take a literacy, understanding, or interpretation test) are arbitrary in nature. This is essentially what S. 2750 would do.

The starting basis for the declaration by Congress would be the finding that it is reasonable to believe that persons who have achieved a sixth grade educational level are sufficiently literate to understand the nature and operation of our Government. Congress can note the generally accepted high standards of education which prevail throughout the United States. Since virtually no one can reasonably be expected to fail a literacy or similar test—fairly administered—if he has completed six grades, Congress is beyond question justified on the evidence available to it in finding that the exclusion of Negroes from the voting rolls is the real purpose of the testing in those places where persons of sixth grade or higher educational achievement are rejected. It can find that the tests are required on arbitrary grounds having no relation to literacy. Such a finding, based in part on the Civil Rights Commission's report, would be entitled to great weight in the courts. See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 94-95 (1961). There the Court said:

"It is not for the courts to reexamine the validity of these legislative findings [about the dangers to the United States of the "worldwide Communist conspiracy"] and reject them * * *. They are the products of extensive investigation in committees of Congress over more than a decade and a half * * *. We certainly cannot dismiss them as unfounded or irrational imaginings * * *."

On the basis of its findings Congress may declare that State performance test requirements are arbitrary and, notwithstanding decisions such as *Lassiter v. Northampton Election Board*, *supra*, and *Camacho v. Rogers*, 190 F. Supp. 155 (S.D.N.Y. 1961), it may restrict their application. It is pertinent to note that findings of this sort were not before the courts in the *Lassiter* and *Camacho* cases. The arbitrary use of literacy tests on a wide scale is a matter peculiarly within the province of the National Legislature to investigate—either directly or through a congressional created arm such as the Civil Rights Commission, or in both ways. And where Congress, upon the basis of such an investigation makes a declaration of arbitrariness, that declaration is entitled to very great weight in the courts. See Goodnow, "Congressional Regulation of State Taxa-

tion," 28 Pol. Sci. Q. 405, 429-431 (1918) ; cf. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 11 (1944).

Congress has, in fact, previously exercised similar power in order to prevent discriminatory State action by defining the "equal protection of the laws" to which a person is entitled under the 14th amendment to include the right to make and enforce contracts, to sue, and to give evidence (42 U.S.C. 1981), and the right to inherit, purchase, lease, sell, hold, and convey property (42 U.S.C. 1982), and by defining, under the enforcement clause of the 13th amendment, "involuntary servitude" to include "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation * * *" (42 U.S.C. 1904).

There is little doubt that the courts would be bound by a congressional declaration that literacy and similar tests required of persons who have completed the sixth grade are arbitrary and unreasonable within the meaning of the due process clause of the 14th amendment.

C. ARTICLE I, SECTION 4

(1) *Historical evidence*

Article I, section 4, of the Constitution provides that—

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.*" [Emphasis added.]

With minor revision, this was substantially the provision as it was submitted by the Committee of Detail of the Constitutional Convention on August 9, 1787. As submitted by the committee, the provision read as follows (Prescott, "Drafting the Federal Constitution," p. 488 (1941)) :

"The times and places and manner of holding the elections of the Members of each House shall be prescribed by the legislature of each State; but their provisions concerning them may, at any time, be altered by the legislature of the United States."

A motion was made by Pinckney and Rutledge to strike out the words "but their provisions concerning them may, at any time, be altered by the legislature of the United States." It was urged that the States could and must be relied on in such cases (*id.*, at 489). James Madison answered this contention as follows (*ibid.*) :

"The necessity of a general government supposes that the State legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the legislatures of the States supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the legislatures of the States ought not to have the uncontrolled right of regulating the times, places, and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power."

His arguments were persuasive and, after relatively brief discussion, the motion to strike was defeated (*id.*, at 490).

Madison's statement affords impressive support for the view that the authority conferred upon Congress by article I, section 4, should be construed broadly so as to permit Congress to counteract State election laws which leave the election of national officers wholly at the mercy of local prejudices. His words suggest, moreover, that the congressional power was intended to reach the substance, not merely the form, of such an election. That this indeed was the intent is confirmed by the discussion of article I, section IV, in the *Federalist* No. 59 (the *Federalist* (ed. J. E. Cooke, 1961), pp. 398-399), written by Hamilton :

"It will not be alleged that an election law could have been framed and inserted in the Constitution which would have been always applicable to every probable change in the situation of the country; and it will, therefore, not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there are only three ways in which this power could have been reasonably modified and disposed: That it must either have been lodged wholly in the National Legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the Convention. They have permitted the regulation of elections for the Federal Government, in the first

instance, to the local administration; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

"Nothing can be more evident than that an exclusive power of regulating elections for the National Government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."

Hamilton also stressed that "it is more consonant to the rules of a just theory to entrust the Union with the care of its own existence, than to transfer that care to any other hands. * * * Id. at 399.

Similarly, when a motion to strike the portion of article I, section 4 vesting authority in the Congress to regulate elections of national officers was made, Madison said (5 Elliot's "Debates on the Federal Constitution 402") :

"* * * What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist? First, of a Senate to be chosen by the State legislatures. If the latter, therefore, could be trusted, their representatives could not be dangerous. Secondly, of representatives elected by the same people who elect the State legislatures. Surely, then, if confidence is due to the latter, it must be due to the former. It seems as improper in principle, though it might be less inconvenient in practice, to give to the State legislatures this great authority over the election of the representatives of the people in the general legislature, as it would be to give to the latter a like power over the election of their representatives in the State legislatures."

Madison's views were concurred by King who said (ibid.) :

"If this power be not given to the National Legislature, their right of judging of the returns of their members may be frustrated. * * *"

It is true that in the *Federalist*, No. 60, in discussing whether the congressional power under article I, section 4 could be used to favor the wealthy and the well born, Hamilton said (the *Federalist* (Ed. J. E. Cooke, 1961) 408, 409) :

"* * * The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution; and are unalterable by the Legislature."

Hamilton's view that the congressional power was not so broad as to permit Congress to alter the qualifications of voters (it may be noted parenthetically that Hamilton was discussing the issue of whether Congress could impose more stringent requirements for voting) reflects a measure of disagreement as to the ultimate scope of article I, section 4. Others took the view that such power was conferred by article I, section 4. The question was touched upon in the Massachusetts ratifying convention. Hon. Mr. White said (2 Elliot's "Debates on the Federal Constitution," 28) :

"If we give up this section * * * there is nothing left. Suppose the Congress should say that none should be electors but those worth 50 or a 100 [pounds] sterling; cannot they do it? Yes, said he, they can * * *."

So too, Dr. Taylor mentioned the possibility that the two branches of Congress could agree to play into each other's hands, and "by making the qualifications of electors 100 [pounds] by their power of regulating elections fix the matters of elections so as to keep themselves in." (Id. at 49-50). Compare the statement of Rufus King (Id. at 51). Similarly, speaking of article I, section 4 in the Virginia convention, Patrick Henry said (2 Elliot's "Debates," 149) :

"According to the mode prescribed, Congress may tell you that they have a right to make the vote of 1 gentleman go as far as the votes of 100 poor men."

He continued (ibid) :

"The power over the manner admits of the most dangerous latitude. They may modify it as they please. They may regulate the number of votes by the quantity of property without involving any repugnancy to the Constitution."

As this memorandum emphasizes in detail elsewhere, S. 2750 does not prescribe or alter State imposed qualifications for voting, but simply establishes an objective method of ascertaining whether an applicant possesses the State-

imposed qualification, i.e. ability to inform oneself of election issues. The critical question, then, is not whether the Founding Fathers intended to permit Congress to alter qualifications—an issue upon which history provides inconclusive answers—but whether they intended to permit the States, without redress by Congress, to abuse their powers over Federal electoral processes by enacting procedures for determining the existence of particular qualifications which are of such a nature as to permit local prejudice to disfranchise qualified citizens. Unquestionably the Founding Fathers did not intend to confer such vast and unchecked power on the State legislatures.

The power given Congress by article I, section 4 was intended to provide the means to remedy abuses by the States in their regulations concerning congressional elections.

In the Virginia ratifying convention, for example, Monroe wanted to know “why Congress had the ultimate control over the time, place, and manner, of elections of Representatives * * *.” Madison gave article I, section 4 this construction (3 Elliot’s “Debates on the Federal Constitution,” 367) :

“Should the people of *any* State by *any* means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government. It was found necessary to leave the regulation of these, in the first place, to the State governments, as being best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to produce uniformity, and prevent its own dissolution.” [Emphasis added.]

In the Massachusetts convention, Parsons feared that without the power vested in Congress under section 4, “the people can have no remedy” against unequal and partial division of the States into districts for the election of representatives, and that if the manner were left to State legislatures free from control by Congress, “they might even disqualify one third of the electors.” (Id. at 27.) The various views in the Massachusetts convention were summarized by the reporters as follows (Id. at 35) :

“Several other gentlemen went largely into the debate on the fourth section, which those in favor of it demonstrated to be necessary; first, as it may be used to correct a negligence in elections; secondly, as it will prevent the dissolution of the Government by designing and refractory States; thirdly, as it will operate as a check in favor of the people against any designs of the Federal Senate and their constituents, the State legislatures, to deprive the people of their rights of election; and fourthly, as it provides a remedy for the evil, should any State, by invasion or other cause, not have it in its power to appoint a place where the citizens thereof may meet to choose their Federal Representatives.”

In the debates in the New York convention, Jones opposed article I, section 4 upon the ground that it might be construed to deprive the States of an essential right which the Constitution intended to reserve to them. Morris replied (2 Elliott’s “Debates on the Federal Constitution,” 326) :

“* * * that so far as the people, distinct from their legislatures, were concerned in the operation of the Constitution, it was absolutely necessary that the existence of the General Government should not depend for a moment on the will of the State legislatures. The power of perpetuating the Government ought to belong to their Federal Representatives; otherwise, the rights of the people would be essentially abridged.”

In the debates in the North Carolina convention, Spencer objected to article I, section 4, on the ground that it gave Congress unlimited power over the election of Representatives and “seemed to throw the whole power of election into the hands of Congress” (Id., vol. 4, p. 52). Iredell defended section 4 upon various grounds, saying at one point (Id. at 54) :

“* * * It might also be useful for this reason: lest a few powerful States should combine, and make regulations concerning elections which might deprive many of the electors of a fair exercise of their rights, and thus injure the community, and occasion great dissatisfaction. * * *”

In the debates in the Pennsylvania convention, Wilson said (Id., vol. 2, p. 482) :

“It is repeated again and again by the honorable gentleman, ‘that the power over elections which is given to the General Government in this system is a dangerous power. * * * The times, places, and manner of holding elections for Representatives may be altered by Congress.’ This power, sir, has been shown to be necessary, not only on some particular occasions, but even to the very existence of the Federal Government. I have heard some very improbable

suspicious, indeed, suggested with regard to the manner in which it will be exercised. Let us suppose it may be improperly exercised, is it not more likely so to be by the particular States than by the Government of the United States? Because the General Government will be more studious of the good of the whole than a particular State will be; and, therefore, when the power of regulating the time, place, or manner of holding elections is exercised by the Congress, it will be to correct the improper regulations of a particular State."

And in the debates in the South Carolina convention, Pinckney said (Id. at 303):

"It is absolutely necessary that Congress should have this superintending power, lest by the intrigues of a ruling faction in a State the Members of the House of Representatives should not really represent the people of the State, and lest the same faction, through partial State views, should altogether refuse to send Representatives of the people to the General Government."

In the light of these debates at the National and State conventions, it is fairly clear that sections 2 and 4 of article I, read together, are concerned with realities of the situation, not with mere form. These debates show that the Founding Fathers intended to secure not the shadow but the substance of the right of the people to choose Federal officers, and that they did not want to leave unprotected at the outset the very machinery by which the constitutional right to choose Federal officers could subsequently be exercised. Of what practical use would this important constitutional right be if a citizen could be barred at the threshold by subtle and sophisticated manipulation in order to disqualify him?

Little in the history of the Constitution prior to its adoption lends support to such an artificial, harsh, and undemocratic result. The most serious disagreement in the Constitutional Convention hinged over whether the people or the State legislatures should elect the Members of the House of Representatives. The conflict was resolved by specifically providing in article I, section 2, that Members of the House shall be "chosen by the people." The power of selection was not given to the State legislatures because of the fear that they might devise types of elections which would defeat the end of representative government; i.e., election by the people. Thus, when on June 21, 1787, General Pinckney moved "that the first branch [the House of Representatives], instead of being elected by the people, should be elected in such manner as the legislature of each State should direct" (Prescott, "Drafting the Federal Constitution" (1941), 208 et seq.), his resolution was vigorously attacked, and ultimately defeated. According to Mr. Madison's notes (Id. at 208-209):

"Hamilton considered the motion as intended manifestly to transfer the election from the people to the State legislatures, which would essentially vitiate the plan. It would increase the State influence which could not be too watchfully guarded against.

"Wilson considered the election of the first branch by the people, not only as the cornerstone, but as the foundation of the fabric. * * * The difference was particularly worthy of notice in this respect, that the legislatures are actuated not merely by the sentiment of the people, but have an official sentiment opposed to that of the General Government, and perhaps to that of the people themselves.

"King enlarged on the same distinction. He supposed the legislatures would constantly choose men subservient to their own views, as contrasted to the general interest, and that they might even devise modes of election that would be subversive of the end in view. He remarked several instances in which the views of a State might be at variance with those of the General Government * * *." [Emphasis added.]

If the authority to determine the method of electing Representatives to Congress was denied to the State legislatures because of the fear that they "might * * * devise modes of election that would be subversive of the end in view," the framers could hardly have contemplated that Congress should sit powerless while States subvert "the end in view" by devices susceptible of abuse and actually used to disfranchise qualified citizens. Such a construction of the Constitution would be wholly inconsistent with its spirit.

It is significant, moreover, that in seven State conventions on the ratification of the Constitution, resolutions were adopted which embodied objections to article I, section 4, and proposed that it should not be invoked except where the legislatures of the States refused or neglected to perform their duties as required by the Constitution. Documents, "Formation of the Union of the American States (1927)": 1018-1019 (Massachusetts); 1023 (South Carolina); 1025 (New Hampshire); 1033 (Virginia); 1039-1040 (New York); 1056-1057 (Rhode

Island); 1050 (North Carolina). Despite these objections and proposed changes in language, article I, section 4, was not revised when the Constitution was ratified, and, although the First Congress recommended 12 amendments to the Constitution, none of these related to article I, section 4. Indeed, the First Congress specifically considered and rejected an amendment which would have restricted the congressional power over elections. I "The Debates and Proceedings in the Congress of the United States," 797-800 (1834).

The attempted changes in article I, section 4, demonstrate common recognition that under article I, section 4, the power of Congress was sweeping, and reinforce the conclusion that the Founding Fathers intended the power of Congress under article I, section 4, to apply not merely to the mechanical aspects of elections for national officers, but also to the substance of such elections.

2. Judicial construction

The courts have also recognized that article I, section 4 is concerned with substance as well as with form. As the court said in *United States v. Munford*, 16 Fed. 223, 228 (C.C.E.D. Va., 1883):

"There is little regarding an election that is not included in the terms, time, place, and manner of holding it."

In *Smiley v. Holm*, 285 U.S. 355, 366 (1932), the Supreme Court spoke of article I, section 4 in equally broad terms:

"It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." [Emphasis added.]

Acting under article I, section 4, Congress in the Enforcement Act of 1870 and associated measures, 16 Stat. 144 (1870); 16 Stat. 254 (1870); 17 Stat. 347-349 (1872), provided measures (mostly later repealed) extensively regulating the conduct of elections of Members of the House. False registration, bribery, voting without legal right, making false returns, interference with election officers, and the neglect by any such officer of any duty required of him by State or Federal law, were made Federal offenses. These laws also made provision for the appointment by Federal judges of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote, to witness the counting of votes and to identify by their signatures the registration of voters and election tally sheets. See *United States v. Gradwell*, 243 U.S. 476, 483 (1917). This far-reaching legislation, which "committed to Federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results," *ibid.*, was held to be a constitutional exercise of the power conferred upon Congress by article I, section 4, with respect to the election of its Members. *Ex parte Stebold*, 100 U.S. 371 (1880); *Ex parte Clarke*, 100 U.S. 399 (1880); *United States v. Gale*, 109 U.S. 85 (1883).

In *Ex parte Stebold*, *supra*, the Court, in sustaining indictments of officers of election for stuffing ballot boxes, relied upon the power of Congress under article I, section 4. The Court said (100 U.S. at 388):

"It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State."

S. 2750 would constitute a permissible regulation of the "manner" of holding elections for Federal officials in two respects. First, it would alter the method of testing whether a prospective voter possesses the particular educational or similar qualification set by the State. Instead, it would substitute an objective and easily ascertainable requirement—completion of six grades of formal education. Second, it would eliminate the racially discriminatory fashion in which existing tests have been administered. In these ways Congress would insure that "the manner" of holding elections for its Members is not improper.

Improper conduct of election officials, as *Ex parte Siebold* states, is an end within the reach of Congress under article I, section 4. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, 321 U.S. 316, 421 (1820):

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Although the validity of S. 2750 does not depend upon it, the Supreme Court has recognized that even the qualifications which the States may set for voting in elections for Members of Congress are subject to restrictions which Congress may impose under its article I, section 4 power. This was suggested as early as 1875, when, in holding that denial of suffrage to women did not contravene the privileges and immunities clause of the 14th amendment, the Court said (*Minor v. Happersett*, 21 Wall. 162 (1875)):

"It is not necessary to inquire whether this power of supervision [over congressional elections] thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts. [Emphasis added.]

In 1941, the Supreme Court went further to declare that under article I, section 4, as supplemented by article I, section 8, clause 18 (the "necessary and proper" clause) Congress may limit the States in the imposition of qualifications themselves. In *United States v. Classic*, 313 U.S. 299, 315 (1941), the Court, speaking through Justice Stone, declared:

"While, in a loose sense, the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the States, see *Minor v. Happersett*, 21 Wall. 162, 170; *United States v. Reese*, 92 U.S. 214, 217-218; *McPherson v. Blacker*, 146 U.S. 1, 38-39; *Breedlove v. Suttles*, 302 U.S. 277, 283, this statement is true only in the sense that the States are authorized by the Constitution, to legislate on the subject as provided by section 2 of article I, to the extent that Congress has not restricted State action by the exercise of its powers to regulate elections under section 4 and its more general power under article I, section 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The above language of the Court in the *Classic* case was cited with approval in *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959). Although holding that a North Carolina literacy test did not violate the 14th and 17th amendments, the Supreme Court was careful to note that it was not suggesting that the Congress had no power to set limits on the imposition of qualifications. Citing the passage from the *Classic* case quoted above, the Court said (360 U.S. at 51):

"So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U.S. 651, 663-665; *Smith v. Allwright*, 321 U.S. 649, 661-662) it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315."

The issue in the *Lassiter* case was the validity of State literacy tests. The Court in the quoted sentence was referring to literacy (as well as other qualifications) in speaking of the State "standards" which would be invalid and ineffective where they conflict with restrictions imposed by Congress "acting pursuant to its constitutional powers." The only constitutional power discussed on the page of the *Classic* opinion cited by the Court in *Lassiter* was the power of Congress under article I, section 4 and article I, section 8, clause 18. It is a necessary inference that the Court in *Lassiter* was reaffirming congressional power to restrict State standards or qualifications for voting for Federal officials. If the congressional power under article I extends this far, there can be no doubt that it permits Congress to set limits upon the manner in which particular qualifications are determined.

D. THE IMPLIED POWER OF CONGRESS TO PROTECT THE PURITY OF THE FEDERAL BALLOT

It is settled that Congress possesses power which, though not specifically enumerated in the Constitution, are implied because they are "necessary and proper" (art. I, sec. 8, clause 18) to carry out the powers expressly delegated by the Constitution to Congress. For example, the Federal criminal power is largely an implied power. *United States v. Fox*, 95 U.S. 670, 672 (1878); *United States*

v. Hall, 98 U.S. 343, 357 (1879); *United States v. Metzdorf*, 252 Fed. 933, 935-936 (D. Mont. 1918). See *Ex parte Yarbrough*, 110 U.S. 651, 658-659 (1884). So, too, are the powers to protect the Government from armed rebellion, *Dennis v. United States*, 341 U.S. 494, 501 (1951); *Barenblatt v. United States*, 360 U.S. 109, 127-128 (1959); and to regulate lobbying for Federal legislation and financial contributions to candidates for Federal office. *United States v. Harris*, 347 U.S. 612 (1954); *Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (1934).

As the *Burroughs* case illustrates, the implied powers of Congress extend to measures to insure the purity of the Federal ballot. The *Burroughs* decision sustained the validity of the Federal Corrupt Practices Act, which required political committees to keep detailed accounts of contributions and to file statements thereof with the Clerk of the House of Representatives. The term "political committee" was defined as including any organization which accepted contributions for the purpose of influencing or attempting to influence the election of presidential or vice presidential electors in two or more States. The defendants, charged with criminal violation of this act, contended that the power of appointment of presidential electors and the manner of their appointment are expressly committed by article II, section 1 of the Constitution to the States, and that congressional authority was limited by that section to prescribing "the time of choosing the electors, and the day on which they shall give their votes * * *." Rejecting this contention, the Court declared (290 U.S. at 545):

"While presidential electors are not officers or agents of the Federal Government (*In re Green*, 134 U.S. 377, 379), they exercise Federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the Nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the Nation in a vital particular the power of self-protection. *Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the General Government from impairment or destruction, whether threatened by force or by corruption.*" [Emphasis added.]

In *Burroughs* the Court relied heavily upon the leading case of *Ex parte Yarbrough*, 110 U.S. 651 (1884). The decision in that case established that the right of qualified voters to vote in congressional elections is derived from the Constitution of the United States and that in the exercise of its implied power to secure the integrity of such elections Congress may legislate to bar the intimidation of voters in those elections. Addressing itself to the argument that "[b]ecause there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted," the Court said (110 U.S. at 658):

"It [the argument] destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the Government or any branch of it by the Constitution, article I, section 8, clause 18."

There is an obvious similarity between corruption of the Federal electoral process by the use of money and corruption of the same process by devices susceptible of being used and actually used to disenfranchise voters because of race. If anything, the latter is more subject to congressional control for a number of reasons: (1) it is directed toward a special class; (2) it is inconsistent with constitutional principles given express recognition in the 14th and 15th amendments; and (3) it is perpetrated by the State, or by State officials sworn to uphold the Constitution, rather than by private persons. As the Court of Appeals for the Fifth Circuit said in *United States v. Wood*, 295 F. 2d 772 (C.A. 5, 1961):

"The foundation of our form of government is the consent of the governed. Whenever any person interferes with the right of any other person to vote or to vote as he may choose, he acts like a political termite to destroy a part of that foundation. * * * Eradication of political termites, or at least checking their activities, is necessary to prevent irreparable damage to our Government.

E. THE RELATIONSHIP BETWEEN THE POWERS GRANTED TO CONGRESS AND OTHER POWERS RESERVED TO THE STATES

It has been suggested that, whatever powers to correct voting abuses Congress might possess, the exercise of these powers by S. 2750 would clash with other constitutional provisions: Article I, section 2, and the 17th amendment (which provide that the qualifications for voting in congressional elections shall be the same as those requisite for voting in elections for the most numerous branch of the State legislature); and article II, section 1 (which deals with the method of appointment of presidential electors). These provisions, however, are not inconsistent with the proposed legislation. Moreover, it is obvious that any exercise of State power based on these provisions cannot override the limitations imposed by the 14th and 15th amendments.

1. S. 2750 would not prescribe qualifications for voting in Federal elections and would not interfere with the imposition of qualifications by the States. It would leave the substantive State-imposed qualification (e.g., literacy) untouched and merely prescribe an objective method of ascertaining whether an applicant possesses that qualification. The power to establish the manner of ascertaining this derives from the express language of article I, section 4, of the Constitution, and as such forms no part of the "qualifications" for voting, as that term is used in article I, section 2 and in the 17th amendment.

At the time of the adoption of the Constitution, the qualifications which the States required were the possession of such qualities or status as were thought to render probable a responsible exercise of the franchise. See *Minor v. Happersett*, 21 Wall. 162, 172-173 (1875) for a list of the qualifications then imposed by each State. There is no reason for believing that the means of proving the qualifications were regarded by the framers as an inseparable part of the qualifications themselves.

In short, article I, section 2 and the 17th amendment permit the States to prescribe qualifications for elections to congressional office—they do not vest in them the power to override a congressional judgment concerning the manner in which qualifications are to be tested. S. 2750 deals with the manner of testing qualifications—not with the qualifications themselves. Thus, it is clear that article I, section 2, and the 17th amendment do not conflict with the congressional exercise of power embodied in the instant bill.

2. Nor is there any conflict between the bill and article II, section 1, which deals with the appointment of presidential electors.

Congress has the power to protect the presidential election process from any corrupt influence, and it has exercised this power on a number of occasions. See, e.g., 42 U.S.C. 1985(c); 42 U.S.C. 1971(b); 18 U.S.C. 610. The courts have sustained this exercise as applied to the regulation of campaign contributions in presidential elections (*Burroughs & Cannon v. United States*, 290 U.S. 534 (1934)) and to the protection from intimidation of Negroes who seek to vote in such elections (compare *Burroughs & Cannon*, *supra*, at 545-546 with *Ex parte Yarborough*, 110 U.S. 651 (1884)). Upon the same basis, Congress may also adopt measures effectively to control racial or other discrimination in the administration of literacy or similar performance tests where such discrimination corrupts elections for the Presidency of the United States.

3. The 14th and 15th amendments prohibit arbitrary State action, denial of equal protection, and racial discrimination in the voting process, irrespective of whether these practices occur in connection with qualifications for voting or with the manner in which qualifications are tested. It is no defense to an action alleging violation of the 14th or the 15th amendment that the activity involved is otherwise within the jurisdiction of the State. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (power of States to control their own municipalities overcome by the 15th amendment). Thus, appropriate congressional action under the amendments would be valid with respect to all elections, Federal and State, notwithstanding article I, section 4, article II, section 1, or the 10th amendment. And, as we have shown, *supra*, this proposed legislation constitutes an appropriate enforcement of the 14th and 15th amendments.

II. THE BILL AS IT AFFECTS CITIZENS WHO HAVE COMPLETED THE SIXTH GRADE IN A SCHOOL IN PUERTO RICO IN WHICH SPANISH IS THE LANGUAGE OF INSTRUCTION

There are also several independent sources of congressional power to support the bill as it affects citizens of the United States who have completed six grades of education in Puerto Rico.

In considering these powers it is important to understand the status of Puerto Ricans in relation to the United States and the development of that status. When Puerto Rico was acquired by the United States, Puerto Ricans lost the protection of the Government of Spain. As stated in *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922) "[t]hey had a right to expect, in passing under the domination of the United States a status entitling them to the protection of their new sovereign." Under the Treaty of Paris between the United States and Spain of 1899 (30 Stat. 1899), it was provided that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by the Congress." In the Jones Act of 1917 Congress conferred U.S. citizenship on Puerto Ricans. In giving to Puerto Ricans the status of citizens of the United States Congress was motivated "by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire to move into the United States proper and there without naturalization to enjoy all political and other rights." *Balzac v. Porto Rico*, *supra*, at 308. The Jones Act "enables them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social, and political." *Ibid*. "A citizen of the Philippines must be naturalized before he can settle and vote in this country. * * * Not so the Puerto Rican under the Organic Act of 1917." *Ibid*.

At the present time Puerto Rico occupies what is designated as a "commonwealth" status. It has a special and unique relationship to the United States. See Public Law 600, 64 Stat. 319 (1950); *Constitution of Puerto Rico*, 48 U.S.C. 713(d); 66 Stat. 327 (1952); Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1 (1963). This relationship is in the nature of a "union [of Puerto Rico] with the United States of America," *Const. of P.R., Preamble*, 48 U.S.C. 731(d). The Puerto Rican constitution recognizes the "coexistence in Puerto Rico of the two great cultures of the American Hemisphere * * *." *Ibid*. It further declares that "We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges." Congress approved the Puerto Rican constitution by a joint resolution of July 3, 1952, 66 Stat. 327 (1952).

With this background in mind, there are a number of powers vested in Congress that support the Puerto Rican provision of the bill: (1) the express power of Congress provided by article IV, section 3, clause 2, of the Constitution to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"; (2) the implied power of Congress to regulate the activities of persons entitled to the special protection of the Government (cf. *United States v. Nioce*, 214 U.S. 591, (1916) (American Indians); *United States v. Holliday*, 3 Wall. 407, 416 (1886) (same); *United States v. Kagama*, 118 U.S. 375 (1886) (same); and (3) the Treaty of Paris, 30 Stat. 1754 (1899) which provides that "the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by the Congress." Compare *Missouri v. Holland*, 252 U.S. 416 (1920) (reserved power) with *Reid v. Covert*, 354 U.S. 1 (1957) (express prohibition).

In considering the extent of these powers as they relate to the instant bill, it is clear that whatever may ultimately be the status of Puerto Rico, they are to be construed in a manner that would enable Congress to encourage the close association of Puerto Rico with this Nation as contemplated in the Constitution of Puerto Rico.

Moreover, as the decisions cited above show, the courts have recognized a far-reaching power in Congress to grant privileges to and to protect citizens who occupy a special dependent status with respect to the Federal Government, and have sustained the extension of this power to areas within the several States. The courts have also upheld the power of Congress to give U.S. citizenship status to citizens of Puerto Rico. S. 2750 would make more effective this grant of citizenship by precluding the denial of the franchise to a person of Puerto Rican origin merely because, even though he is literate, the language in which

he was educated—under the auspices of the United States—is Spanish rather than English. Congress has the relatively vast power to confer citizenship upon Puerto Ricans. It must also have the power to accomplish the far more limited aim embodied in the bill. This is especially so since the bill deals only with elections to Federal office—a matter in which both the United States and those affected by this bill have an obviously close interest.

In addition to these several special sources of congressional power, the bill as applied to persons educated in Puerto Rico rests also upon the constitutional provisions discussed in part I of this memorandum. Article I, section 4 confers power to regulate the manner of testing State-imposed qualifications in congressional elections. Congress, as indicated, has the duty of assuring to every State a republican form of government and to legislate concerning arbitrary discrimination. The declaration of the Congress that denial of the franchise to Spanish-educated Puerto Ricans is arbitrary within the meaning of the due process clause of the 14th amendment, would, of course, be accorded considerable weight by the courts. See part I above. And the relationship of all these powers to article I, section 2, the 17th amendment and article II, section 1 is the same as that of the powers discussed in part I respecting English-speaking citizens.

The bill is valid in its several applications.

(The following is the information regarding the Department of Justice survey of 13 States with literacy tests, referred to by the Attorney General.)

APRIL 18, 1962.

WILLIAM A. CREECH,
*Chief Counsel and Staff Director, U.S. Senate, Committee on the Judiciary,
Subcommittee on Constitutional Rights, Washington, D.C.*

DEAR MR. CREECH: Enclosed as per request of the subcommittee are copies of letters and telegrams received from officials of the 13 States outside the South which have literacy tests, regarding the effect which the sixth-grade provisions of S. 2750, 87th Congress, 2d session would have upon their eligibility to vote of citizens within their respective jurisdictions. We were also advised by telephone by Mr. G. Gary Sousa, law secretary of the Board of Education of the city of New York, that the literacy test for voters administered by the Board of Education of the city of New York is a simple, fourth grade level test.

According to these replies, virtually all persons with a sixth-grade education would be able to satisfy the literacy tests of the States involved.

Sincerely,

BURKE MARSHALL,
Assistant Attorney General, Civil Rights Division.

Enclosures.

U.S. DEPARTMENT OF JUSTICE.
U.S. ATTORNEY, DISTRICT OF ALASKA,
Anchorage, Alaska, March 9, 1962.

Mr. IRVING N. TRANEN,
*Civil Rights Division,
Department of Justice, Washington, D.C.*

DEAR MR. TRANEN: Pursuant to my telephone conversation with you of March 8, 1962, I have reviewed the Alaskan law concerning voter qualifications and discussed its administration, interpretation, and effect with Mr. Hugh Wade, secretary of state and election commissioner of the State of Alaska, Mr. Ralph Moody, attorney general for the State of Alaska, and Mr. Ben Boeke, city clerk, Anchorage, Alaska, who is in charge of the voting registration for the largest city in Alaska. A résumé of their comments on these matters is hereinafter set forth.

The applicable Alaska statute is set forth in chapter 83 of the Session Laws of Alaska, 1960, as follows:

"Section 1.01. Voter Qualification. Any person who has the following qualifications may vote at any election and party nomination: * * * (5) An ability to read or speak the English language unless prevented by physical disability * * *" (my italics).

You will note that the statute provision calls for the ability to read or speak the English language. The alternative requirement that a voter need only to speak English means that our voting laws do not call for literacy in the usual sense of the word.

In discussing this with Mr. Hugh Wade, the Secretary of State, he indicated that the State did apply these requirements alternatively and any person who can speak English can vote. He knows of no instance where there have been any complaints or a voter has been disqualified. Prior to elections Secretary of State Wade's office points out to the election officials the alternative nature of these requirements. No tests of ability to read or speak are provided for and Mr. Wade stated that he has received no reports of persons who presented themselves to vote but who were disqualified because of these requirements. He further stated that the election officials are required to make reports if such an incident arises. As a practical matter if a person presents himself to the voting officials to vote and he is even unable to sign his name, an "X" witnessed by two other persons will permit the person to vote. Mr. Wade stated that there is no question in his mind that if the standard of a sixth grade education were imposed as a voting requirement in Alaska, many native voters would be disqualified.

In my discussion with Mr. Moody he indicated that as attorney general of the State, the statute quoted above was interpreted as requiring alternatively the ability to read or to speak English. - This interpretation is, of course, in accordance with the application of the statute as described by Mr. Wade. Mr. Moody also stated that he is aware of no complaints which have ever been made to his office concerning any voting requirements under this section of the statute.

Mr. Boeke, city clerk, registrar of voters for the city of Anchorage, stated that no person in the Anchorage area had ever been disqualified from voting as a result of this statute. He recalls one test case which was started in the early 1950's, but disposed of on the ground that the voter, though unable to write could speak, and therefore was qualified to vote.

Dr. Norby, head of the Department of Education, stated that in the native villages of Alaska he is certain that many of the older natives are unable to read and possibly even to speak English. In some of these villages, schools have only been in existence for the last 2 or 3 years. He expressed concern that any requirement such as a sixth grade education would certainly disenfranchise many native voters. He also stated that apart from these natives he believed that any person with a sixth grade education would normally be literate and therefore a literacy test for such persons would seem unnecessary.

In summary I again point out that there is, strictly speaking, no literacy test for voters in Alaska and there is no statewide registration law. As a practical matter it appears that almost any person who presents himself to the polls for voting purpose can qualify. Section 3.24 Session Laws of Alaska, 1960, *supra*, provides for assisting voters who cannot read or write as follows:

"Sec. 3.24. Assisting Voter by Judge. Any qualified voter who is incapable of reading, of marking the ballot or of signing his name may request any judge to assist him, and the judge shall assist the voter as requested."

As has been heretofore indicated many of the outlying areas of the State which are populated largely by natives have had little contact or any formal education and in some instances scarcely speak the English language. I do not know whether a smaller portion of the eligible population in such an area votes than in the more populous districts. Even if the figures were available to make such an evaluation, I am not certain that it would mean that persons were prevented from voting because of statutory voting requirements or whether it indicated an indifference on the part of the native population. In my opinion in the outlying native areas there is considerable flexibility in establishing voter qualifications to the extent that persons who barely are able to speak English are permitted to vote if they desire to do so. I suggest that the experience of all of the persons mentioned heretofore in which no complaints of any nature have ever been heard (except the early 1950 incident referred to by Mr. Boeke which involved a contested vote cast by a Negro) bears this out.

I trust that this information will prove of assistance concerning the proposed legislation on this matter. I regret that no affidavits or letters from the persons interviewed are attached. Because of the limited time involved, and the fact that three of the four persons contacted were in our State capital of Juneau, some 600 miles away, it was impossible to obtain affidavits. If desired in the future, affidavits can be obtained setting forth in greater detail the information summarized in this letter.

If this office can be helpful in any other respect, please let me know.

Sincerely,

WARREN C. COLVER, U.S. Attorney.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF ARIZONA,
Phoenix, March 8, 1962.

Re qualification of electors in Arizona.

Mr. IRVING N. TRANEN
Civil Rights Division, Department of Justice,
Washington, D.C.

DEAR MR. TRANEN: In response to your telephone call of this day, I immediately got in touch with George J. Erhardt, who is the gentleman who has been in charge of the registrar of voters' office in Maricopa County for many years and is thoroughly familiar with the procedures that are used in Arizona to test the qualifications of electors. In the first place, as you probably know, our registration and voting requirements are set forth in section 16-101, Arizona Revised Statutes.

Since you were specifically interested in the literacy tests that are applied, it was concerning this that I questioned Mr. Erhardt. He said the procedure used in this county, and in general throughout all counties of the State, was to have each person asked at the time they register to vote whether or not they were able to read the Constitution of the United States in the English language, and you will notice from the two sample forms enclosed, which are headed "Affidavit of Registration," that in paragraph 9 the voter, by signing his name to this affidavit, swears that he is able to read the Constitution of the United States in the English language. Mr. Erhardt said it was a practice, if there was any question about this, the registrar would usually ask the person who was registering to read portions of the affidavit of registration, or to read the other printed papers I enclose which are entitled "Article 1. Registration Requirements", and if the voter could read these he was allowed to register for voting purposes.

Subsequent to this, when the voter appeared to vote on election day, the voter is required, prior to being given an election ballot, to sign his name to the sheets which list all of the registered voters eligible to vote in the particular precinct, and if there is any question as to whether the voter can read the Constitution of the United States in English, this question would be raised by a challenger at the voting place and the voter would then be requested to read one of the enclosed cards which are excerpts from the Constitution of the United States. Then the judges at the polling place would decide whether or not the voter had properly met this test.

This is the entire procedure that is followed generally throughout Arizona. I say generally because I have not had the opportunity to check all counties but I did check with Pima County and essentially the same procedure is followed there, which is our second largest county in terms of population. I also checked with the office of the secretary of state, Wesley Bolin, and they told me this was the procedure followed generally throughout the State in all counties. Mr. Bolin also agreed to write a letter addressed to you but directed to the Attorney General, advocating the proposed change in the law whereby a sixth-grade education would create a presumption of literacy as a voting requirement. This letter will be sent directly to your office by Mr. Bolin. The reason I asked Mr. Bolin to send a letter is because he is the State official in charge of the voting procedures for the entire State.

Also, pursuant to your request, I got in touch with the secretary of public instruction, W. W. "Skipper" Dick, and asked if he could send a statement similar to that of Mr. Bolin to the Attorney General, addressed to your office, and he said that he would get such a statement off to you in the mail today.

I believe that we have given you all of the information requested. If you need anything additional, please do not hesitate to call. I might add that, based on my own personal experience and that of others who have been active in elections in the past years, we have had no serious problems of our literacy tests being applied harshly or in any discriminative way to deprive voters of their rights. However, I do believe that the sixth grade requirement you mentioned to me would simplify matters, except for the situations where persons might be able to read and write who had never finished the sixth grade.

Yours very truly,

C. A. MURCKE, U.S. Attorney.

ARIZONA REVISED STATUTES, 1956

ARTICLE 1. REGISTRATION REQUIREMENTS

Sec. 16-101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

- (1) Is a citizen of the United States.
- (2) Will be twenty-one years or more of age prior to the regular general election next following his registration.
- (3) Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.
- (4) Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.
- (5) Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

STATE OF ARIZONA,
OFFICE OF THE SECRETARY OF STATE,
Phoenix, March 8, 1962.

HON. ROBERT KENNEDY,
U.S. Attorney General,
Washington, D.C.

DEAR BOB: At the request of our mutual friend, Carl Muecke, U.S. district attorney of Arizona, I would like to state that I firmly believe that a level established for voting rights to begin with a sixth grade education is a good start.

We have had no problems to date in our election laws in the State of Arizona.

If we can be of further assistance to you, please contact me or Carl and we shall be delighted to furnish additional information.

With kindest personal regards, I am,

Sincerely,

WESLEY BOLIN, *Secretary of State.*

STATE OF ARIZONA,
DEPARTMENT OF PUBLIC INSTRUCTION,
Phoenix, March 9, 1962.

HON. ROBERT KENNEDY,
Attorney General,
Department of Justice, Washington, D.C.

DEAR MR. KENNEDY: I have been asked my opinion regarding the educational qualifications for voting throughout the United States.

I firmly believe that a person who can read and understand the United States Constitution, and who has a minimum of sixth grade elementary education, should qualify to vote in any local, State, or National election.

If writing my opinion on this matter has been of any assistance to you, I am glad to be of help.

Best wishes.

Sincerely yours,

W. W. DICK, *Superintendent.*

NEW HAVEN, CONN., March 9, 1962.

IRVING TRANEN, Esq.,
Civil Rights Division,
Department of Justice, Washington, D.C.:

Understand that secretary of state, Ella Grasso, considers sixth grade education to be sufficient for voting purposes, from her experience in Connecticut.

ROBERT C. ZAMPANO, *U.S. Attorney.*

SACRAMENTO, CALIF., March 14, 1962.

HON. ROBERT KENNEDY,
U.S. Attorney General,
Washington, D.C.:

Your proposed amendment to the Civil Rights Act is an appropriate extension and guarantee of the right to vote. We in California do not have a problem with the exclusion of qualified electors from the voting list. However, we would welcome your proposed change in the law because it would be an added guarantee to our citizens without, in any sense, raising the possibility that unqualified people would be added to the voting rolls.

Sincerely,

EDMUND G. BROWN, Governor of California.

WILMINGTON, DEL., March 9, 1962.

IRVING TRANEN,
Civil Rights Division, Department of Justice, Washington, D.C.

DEAR MR. TRANEN: Subject voting and literacy tests in the State of Delaware, article 5, section 2, of the constitution of the State of Delaware provides that no person "shall have the right to vote unless he shall be able to read the constitution in the English language and write his name. * * *"

There are no reported cases interpreting this section of the constitution.

All the public officials concerned with the enforcement of the voting laws of the State of Delaware are in agreement that they do not know of any case within recent years in the State of Delaware in which a person was denied the right to vote on the basis that he was unable to read the constitution of the State in English. These persons are in accord that the literacy test has not been in recent years and is not at the present time a factor in voting in the State of Delaware. The following persons contributing this information: Hon. Januar D. Bove, Jr., attorney general of the State of Delaware; Hon. Ernest E. Killen, State election commissioner; Mr. Edwin W. Hutchinson, secretary, Department of Elections for New Castle County; Mr. Harold J. Carrow, Sr., secretary, Department of Elections for Kent County; Mr. W. D. Wilkins, secretary, Department of Elections for Sussex County. One official phrased it, "Most everybody nowadays knows how to read and write. Those who don't know how to read don't go to the polls. A 1959 report of the Delaware Commission on Civil Rights report to the President also indicates that there could be found no impediments to the right to vote based on literacy test.

Dr. George R. Miller, Dover State Superintendent of Public Instruction, is sending a letter addressed to the Attorney General, care of Mr. Tranen, to the effect that it may be presumed that a person who has completed the sixth grade is literate as that term is commonly used.

The office of the Governor felt that the statement of the State superintendent would adequately cover what was essentially a technical educational question.

ALEXANDER GREENFELD, U.S. Attorney.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF MAINE,
Portland, March 9, 1962.

ASSISTANT ATTORNEY GENERAL,
Civil Rights Division, Department of Justice,
Washington, D.C.
(Attention: Irving Tranen).

SIR: In reference to your telephone inquiry of March 8, 1962, I have discussed the subject matter with the following people:

Harriet Petersen, chairman, board of registration, city of Portland, advises that a test is given to each applicant. A copy of the constitution of the State of Maine in pamphlet form is shown to each applicant and a paragraph or section is pointed out and the applicant is asked to read a sentence or two. Mrs. Petersen states that she has refused only one applicant because of the literacy requirements in a period of 3 years and states that she does not be-

lieve any person with a sixth grade education would have difficulty in passing the test. The one refusal was based upon the inability of the applicant to read English although the applicant was able to read Italian.

William H. Soule, superintendent of schools, city of Portland, states that he has no knowledge of any existing problem whereby any substantial segment of the population is denied voting privileges because of their failure to meet the literacy requirements and further states that an average person with a sixth grade education should have no difficulty in reading from the constitution of the State of Maine which is the only literacy requirement under the laws of the State of Maine.

Joseph Edgar, deputy secretary of state, State of Maine, who supervises elections in the State of Maine as part of his duties, states that in his experience the only group that has had difficulty in passing the literacy requirements have been French-Canadian immigrants who read French, but are unable to read English. Mr. Edgar states that although the law requires that an applicant read from the Constitution, as a practical matter the test is not actually given in many of the small towns where the registrar of voters personally knows most of the applicants. He further stated that Maine law does not provide for any written test for applicants and he has no knowledge of any such test being given in this State by any of the local boards.

Kermit S. Nickerson, deputy commissioner of education, State of Maine, states that he is unaware of the existence of any problem concerning the inability of any substantial number of applicants to meet the literacy requirements. He further states that a normal person with a sixth grade education should have no difficulty in reading from the State of Maine constitution.

Fred Robinson, former selectman and present registrar of voters, town of Cumberland, Maine, states that there have been no instances in his experience when an applicant was refused registration on the basis of his inability to meet the literacy requirements.

I hope the above information will be of use to you and if I can be of any further assistance, please do not hesitate to call upon me.

Respectfully,

ALTON A. LESSARD,
U.S. Attorney.

By WILLIAM E. MCKINLEY,
Assistant U.S. Attorney.

STATE OF HAWAII,
Honolulu, March 8, 1962.

Re S. 2750, 87th Congress, 2d session, entitled "A bill to protect the right to vote in Federal elections free from arbitrary discrimination by literacy test or other means."

Mr. IRVING TRANEN,
Civil Rights Division, Department of Justice,
Washington, D.C.

DEAR MR. TRANEN: Regarding the above bill, please be advised that article II, section 1, of the constitution of the State of Hawaii provides that no person shall be qualified to vote unless he is also able, except for physical disability, to speak, read, and write the English or Hawaiian language.

This office is in charge of enforcing the above provision as to elections of all elective State officers. It has been my experience and the experience of this office that no citizen of this State who has had a sixth grade education or better has been denied the right to vote on account of the State constitution provision aforesaid. Normally, a person having had at least a sixth grade education has had no difficulty to qualify to vote.

Yours truly,

JAMES K. KEALOHA,
Lieutenant Governor.

CITY AND COUNTY OF HONOLULU, HAWAII,
March 8, 1962.

Re S. 2750, 87th Congress, 2d session, entitled "A bill to protect the right to vote in Federal elections free from arbitrary discrimination by literacy test or other means."

Mr. IRVING TRANEN,
Civil Rights Division, Department of Justice, Washington, D.C.

DEAR MR. TRANEN: Regarding the above bill, please be advised that article II, section 1, of the constitution of the State of Hawaii provides that no person shall be qualified to vote unless he is also able, except for physical disability, to speak, read, and write the English or Hawaiian language.

This office is in charge of enforcing the above provision as to elections of all elective Oahu County offices. It has been my experience and the experience of this office that no citizen of this county who has had a sixth-grade education or better has been denied the right to vote on account of the State constitution provision aforesaid. Normally, a person having had at least a sixth-grade education has had no difficulty to qualify to vote.

Yours truly,

EMPEROR A. HANAPI, City Clerk.

COMMONWEALTH OF MASSACHUSETTS,
Boston, March 9, 1962.

Hon. ROBERT F. KENNEDY,
Attorney General of the United States, Department of Justice, Washington, D.C.

DEAR SIR: The literacy test which applies in the Commonwealth of Massachusetts to applicants for registration as voters is contained in article XX of the amendments to the constitution of the Commonwealth, approved and ratified by the people on May 1, 1857. It reads, in part: "No person shall have the right to vote, or be eligible to office under the constitution of this Commonwealth, who shall not be able to read the constitution in the English language, and write his name: *Provided, however,* That the provisions of this amendment shall not apply to any person prevented by a physical disability from complying with its requisitions * * *."

General Laws, chapter 51, section 44, which section implements the constitutional provision, requires that the State secretary provide each board of registrars with "a copy of the constitution of the Commonwealth printed in English on uniform pasteboard slips, each containing five lines of said constitution, printed in type of a size not less than 24 point." Every applicant for registration as a voter is required to read one of the slips "in such a manner as to show that he is neither prompted nor reciting from memory."

It is my opinion, and that of professional educators with whom I have been in contact in the matter, that this Commonwealth's literacy test is one which can be passed by any average student who has completed the prescribed sixth-grade education in the grammar schools of the Commonwealth.

Respectfully yours,

KEVIN H. WHITE,
Secretary of the Commonwealth.

MANCHESTER, N.H., March 9, 1962.

Hon. ROBERT KENNEDY,
Attorney General, Department of Justice,
Washington, D.C.:

Furnishing information requested by you we would advise that the literacy test required for voter registration under New Hampshire law, chapter 55, revised statutes, annotated, is not burdensome and would not exclude any voter with a minimum or sixth-grade education. We had no complaints that the test is either unreasonable nor that it has ever been used to bar people of foreign extraction who are in fact minimally literate.

J. MURRAY DEVINE,
Democratic State Chairman.
WILLIAM L. DUNFEY,
Democratic National Committeeman.
MARGARET NORMANDIN,
Chairman, Democratic Voter Registration.

LAW OFFICES OF WILLIAM W. TREAT,
Hampton, N.H., March 9, 1962.

Re literacy tests.

HON. ROBERT KENNEDY,
U.S. Attorney General, Department of Justice,
Washington, D.C.

DEAR GENERAL KENNEDY: It has been brought to my attention by the U.S. district attorney for New Hampshire, William H. Craig, that hearings in Washington are being held relative to literacy tests, as a qualification for voting.

I am pleased to be able to report to you that the laws in New Hampshire relating to literacy tests are not being used to discriminate against any voter because of color, race, nationality or religion. It is my opinion that anyone in New Hampshire, with a sixth-grade education, would be able to pass our literacy test.

No instance has come to my attention where a voter, or a prospective voter has been improperly denied the right to vote, because of alleged lack of literacy. I know of no abuse of literacy tests in New Hampshire.

In addition to being an attorney, I am a member of the Republican National Committee from New Hampshire.

A copy of this letter is being mailed to the Honorable William H. Craig, U.S. district attorney, Concord, N.H.

Sincerely yours,

WILLIAM W. TREAT.

STATE OF NEW HAMPSHIRE,
Concord, March 9, 1962.

HON. ROBERT F. KENNEDY,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR GENERAL KENNEDY: The Honorable William H. Craig, Jr., U.S. attorney for the district of New Hampshire, has requested me to write to you with respect to literacy tests for voting in the State of New Hampshire in order that you may be informed prior to March 15, 1962, when I understand you or someone in the Department will appear before a House committee.

Accordingly, I write to advise you that in my opinion anyone with a sixth grade education can pass the test required for voting in New Hampshire and that literacy tests are administered according to applicable provisions of New Hampshire Revised Statutes Annotated, chapter 55, sections 10 through 13, a copy of which is appended.

Respectfully yours,

WILLIAM MAYNARD,
Attorney General.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED, CHAPTER 55

10. Reading Test. The qualifications of an applicant shall be determined by the supervisors, who shall examine him under oath relative thereto, and shall, unless he is prevented by physical disability, or unless he had the right to vote, or was sixty years of age or upwards on January first, nineteen hundred and four, require him to write and to read in such manner as to show that he is not being assisted in so doing and is not reciting from memory. [Sources: 1905, 53:1. P.L. 24:8. R.L. 32:8]

11. Slips for Test. Supervisors shall be provided by the secretary of state with a copy of the constitution of the state printed on uniform pasteboard slips, each containing five lines of the constitution printed in eighteen point type, and suitable writing books in which to write. The secretary of state shall upon request provide new slips and writing books to replace those used up, worn out or lost. [Sources: 1905, 53:1. PL 24:9. RL 32:9]

12. Manner of Test. The supervisors shall place said slips in a box provided by the secretary of state, which shall be so constructed as to conceal them from view. Each applicant shall be required to draw a slip from the box and read aloud the five lines printed thereon, and to write one line printed on said slip and sign his name thereto, in full view and hearing of the supervisors. No person failing to read the constitution as printed on the slip thus drawn, and to write as aforesaid, shall be registered as a voter. [Sources: 1905, 53:1. PL 24:10. RL 32:10]

13. Care of Slips. Each slip shall be returned to the box immediately after the test is finished, and the contents of the box shall be shaken up by a supervisor before another drawing is made. The supervisors shall keep the slips in the box at all other times. [Sources: 1905, 53:1. PL 24:11. RL 32:11]

NEW YORK, N.Y., March 12, 1962.

Attorney General ROBERT F. KENNEDY,
Care Irving N. Tranen,
Civil Rights Division, the Department of Justice, Washington, D.C.:

I believe that completion of the sixth primary grade of a public or accredited private school in the United States would comprise adequate and reliable evidence of at least the degree of literacy heretofore and now required for the privileged of voting in any Federal election. I therefore hope the Senate will pass S. 2750.

ARTHUR I. GATES,
Supervisor of Research Institute of Language Arts, Teachers College,
Columbia University.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF OREGON,
Portland, March 9, 1962.

Hon. BURKE MARSHALL,
Assistant Attorney General, Civil Rights Division,
Department of Justice, Washington, D.C.
(Attention: Richard K. Parsons).

DEAR MR. PARSONS: In response to your question with respect to the interpretation of ORS 247.131 which provides for a literacy test prior to registration of an Oregon voter, I have made inquiry of John D. Weldon, registrar of elections of Multnomah County, Oreg., which includes Portland and is, of course, the most populous county in the State.

Mr. Weldon has been our registrar of elections for a number of years; and in my opinion is qualified to comment both upon the interpretation and practice with respect to the operation of the Oregon statute.

He states that at the time that the elector is required to read a paragraph of material in the event of any doubt as to literacy, the inquiry is directed solely to ascertain the ability of the elector or to read names, slogans, and party designations on the ballot; and if, in the opinion of the registrar, the elector demonstrates his ability to be able to do this, he will be permitted to register even though he demonstrates some difficulty in the performance of the reading of available material.

In the opinion of Mr. Weldon, "A person with a fourth-grade education from any accredited school in the United States should be conclusively presumed to be able to read sufficiently well to qualify as a voter."

I have read the preceding to Mr. Weldon prior to sending same. It meets with his approval. He authorizes us to quote his opinion in the event it will be helpful.

Yours very truly,

SIDNEY I. LEZAK, Acting U.S. Attorney.

STATE OF WASHINGTON,
Olympia, Wash., March 9, 1962.

Hon. ROBERT F. KENNEDY,
Attorney General of the United States,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: You have requested that I advise you as to the literacy requirements of the State of Washington with respect to voting registration, and further, as to the actual practice used in administering any literacy test.

The fifth amendment of our State constitution requires that a qualified elector be one who is able to read and speak the English language, and directs the legislature to enact laws defining the manner of ascertaining whether or not a person is so qualified.

The legislature accordingly enacted RCW (Revised Code of Washington) 29.07.070, which prescribes the actual literacy "test." Under this provision, the

prospective voter must state, under oath, that he is able to read and speak the English language so as to comprehend the meaning of ordinary English prose. In the event the registration officer has some doubt as to such averment, he has the authority to require the applicant to read aloud and explain the meaning of some ordinary English prose.

With respect to the administration of our literacy "test," I am informed by Mr. Kenneth N. Gilbert, who has been our State superintendent of elections for the past 20 years, that it is a rare occasion for a registration officer to doubt or dispute the sworn statement of an applicant that he is able to read and speak the English language. Mr. Gilbert further informs me that to his knowledge no person, who claimed he was qualified with respect to our literacy requirement, has ever been denied registration.

For your convenience and general information, I have set forth the fifth amendment of our constitution and RCW 29.07.070 in full on separate pages which are enclosed herewith.

I hope this information will be of some assistance in your present endeavor. If I can be of any further assistance, please feel free to contact me at any time.

My best to you and yours,

JOHN J. O'CONNELL,
Attorney General.

Enclosures.

FIFTH AMENDMENT TO THE STATE CONSTITUTION

QUALIFICATIONS OF ELECTORS. All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election, at which they offer to vote; they shall be able to read and speak the English language: *Provided, That* Indians not taxed shall never be allowed the elective franchise: *And further provided, That* this amendment shall not affect the rights of franchise of any person who is now a qualified elector of this state. The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section. There shall be no denial of the elective franchise at any election on account of sex.

RCW 29.07.070

Having administered the oath, the registration officer shall interrogate the applicant for registration, concerning his qualifications as a voter of the state, and of the county, city, town, and precinct in which he applies for registration, requiring him to state:

- (1) His full name;
- (2) Whether he will be twenty-one years of age on the day of the next election;
- (3) Place of birth;
- (4) Place of residence, street and number, if any, or post office or rural mail route address;
- (5) Occupation;
- (6) Citizenship;
- (7) If a citizen of the United States, whether native born or naturalized;
- (8) If naturalized, whether in his own right or by virtue of his father's naturalization;
- (9) In the case of a woman, not native born, whether naturalized in her own right or by virtue of her father's naturalization or by virtue of her marriage to a citizen of the United States;
- (10) The place and date of the naturalization relied upon and the name of the court in which it took place;
- (11) Whether the applicant having been a native born or naturalized citizen of the United States has ever renounced his allegiance to the United States, and if so, whether he has since been naturalized as a citizen of the United States;
- (12) In case the applicant is of foreign birth and is not a naturalized citizen of the United States, whether he was a legal voter of the Territory of Washington prior to November 11, 1889;

(13) Whether the applicant was a legal voter of the state of Washington on November 3, 1896, or is able to read and speak the English language so as to comprehend the meaning of ordinary English prose, and in case the registration officer is not satisfied in that regard, he may require the applicant to read aloud and explain the meaning of some ordinary English prose;

(14) Whether the applicant has lost his civil rights by reason of being convicted of an infamous crime, and if so, whether such rights have been restored in the manner provided by law;

(15) Whether the applicant has resided in the state not less than eleven months;

(16) Length of residence in the county in which registration is applied for, not less than sixty days;

(17) Length of residence in the precinct in which registration is applied for;

(18) Whether the applicant is a taxpayer of the state;

(19) The place and address of the last former registration of the applicant as a voter in the state.

Answers to all questions shall be inserted on the duplicate registration card.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF WYOMING,
Cheyenne, March 9, 1962.

Attention: Mr. Richard Parson.

In re: Telephone call March 8, 1962, 3 p.m., civil rights, voters.

HON. ROBERT F. KENNEDY,
Attorney General,
Department of Justice,
Washington, D.C.

DEAR MR. KENNEDY: The Wyoming Constitution became effective July 10, 1890. Article 6, section 9, provides:

"Educational qualifications of electors.—No person shall have the right to vote who shall not be able to read the constitution of this state."

Only one case has been decided under this provision, *Rasmussen v. Baker*, 50 Pac. 819, 7 Wyo. 117, decided November 15, 1897. This case challenged the votes of a number of Finnish coalminers who had voted in a general election. It was alleged that these voters could not read the constitution in English although they could read and write their own language.

The court held at 50 Pac. 828:

"* * * in the sense of the constitutional requirement, no person is able to read the constitution of this State who cannot read it in the English language, and consequently is not entitled to vote, unless such incapacity is the result of physical disability, or such person had the right to vote at the time of the adoption of the constitution."

The question raised in this case is applicable in some sections of Wyoming today due to the fact that in the beet-growing sections and certain mining and railroad areas there are in some precincts concentrated numbers of Spanish or Mexican citizens.

Most of these precincts require prior registration, although registration can be made on the day of a primary election at the polls. Election boards are required to allow a person the right to vote if the voter's name is on the registration list. The voter's name may be on the list due to the voters having registered at the Office of the County Clerk in which event this official would have determined the qualifications of the voter, include the voter's ability to read the constitution in English.

On the day of a primary election these qualifications, including the voter's ability to read the constitution in English would be determined by the election board. In either event, once the voter's name appears on the registration list it will continue to so appear at each subsequent election.

Certain simple provisions provide for a voter changing residence from precinct to precinct within a county. However, if the voter moves to another county it is conceivable that such a voter in order to register there may be required to display ability to read the constitution in English.

The foregoing paragraphs may be helpful in understanding the situation in this State relative to voters. In my opinion, there has not been any attempt to keep qualified voters from the polls. In fact, the opposite has been the case.

Political committees have been very active in encouraging people who might be timid in voting to exercise the privilege. Political committees and civic organizations have made appointments to take people to county clerks to register and to take them to the polls on primary election day to vote.

On this situation I can speak from first-hand experience. I have over the past 15 years, visited every county within Wyoming on a number of occasions to explain these laws to various committees and organizations. In fact, some 10 years ago I had several radio tapes made which were used on stations throughout the State in order to encourage people who had the qualifications of voters, but were in most cases timid, to register and vote.

U.S. district judge for the District of Wyoming, Ewing T. Kerr, was for a number of years chairman of a major political party in this State, and I have just mentioned this subject to him and asked about his experience. He said, "tell the Attorney General that there is no such problem in this State."

I cannot agree to such a broad statement because there is an education problem, and also the problem of getting people who have all the qualifications to exercise their franchise. However, those are problems that will be present with each succeeding generation, which the people who believe in good government will have to strive to solve.

With additional time I know that I could furnish a number of affidavits expressing these views. I do not wish to imply that there are absolutely no instances where the franchise has been denied. Those cases are however extremely few, and are mainly misunderstandings of laws that are quickly adjusted.

I trust that this letter will be of some benefit.

Sincerely yours,

ROBERT N. CHAFFIN,
U.S. Attorney.

STATE OF DELAWARE,
DEPARTMENT OF PUBLIC INSTRUCTION,
Dover, March 9, 1962.

Hon. ROBERT F. KENNEDY,
Attorney General of the United States,
Office of the Attorney General, Washington, D.C.

DEAR ATTORNEY GENERAL KENNEDY: My attention has been brought to the fact that a proposed bill before Congress raises the issue of whether a person who has completed the sixth elementary grade may be presumed to be literate.

In the State of Delaware the nature of instruction and standards in the public schools is such that it may be presumed that a person who has completed the sixth elementary grade of any public school is literate, as that term is commonly used.

Very sincerely yours,

GEORGE R. MILLER, Jr., State Superintendent.

(The Department of Justice report on S. 2979 follows:)

DEPARTMENT OF JUSTICE,
Washington, April 19, 1962.

Hon. SAM J. ERVIN, Jr.
Chairman, Constitutional Rights Subcommittee, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to the request of the committee for the views of the Department of Justice on the voting recommendations of the Commission on Civil Rights. These recommendations are embodied principally in S. 2979, a bill to further secure and protect the rights of citizens to vote in Federal and States elections.

Section 2 of S. 2979 provides that the right to vote for any State or Federal officer shall not be denied "by the United States or by any State" except for: Inability to meet reasonable age requirements; inability to meet reasonable requirements as to residence; legal confinement at the time of election or registration; conviction of a felony; and literacy tests as limited by section 3, which provides that successful completion of a least six grades of formal education shall satisfy all requirements for any literacy or other tests of ability to read and understand which are administered to determine qualifications to vote.

Section 4 of the bill would amend R.S. 2004(b) (42 U.S.C. 1971), which prohibits the intimidation and coercion of persons for the purpose of interfering

with their right to vote, so as to forbid the denial, abridgment, or interference with the right to vote "by arbitrary action, or by arbitrary inaction."

Section 5 directs the Director of the Census to compile statistics relating to voting registration in each State, including the number of registrants classified by race, color, and national origin, and the number of persons of each classification who have voted in any election since January 1, 1900. This information would thereafter be compiled as part of each decennial census.

Section 2 of the bill, which invalidates all qualifications for the right to vote except those enumerated, would face the argument that it invalidates the assertedly exclusive power of the States to determine the qualifications of electors. The Federal Government has a substantial power to protect the integrity and thereby the democracy of the Federal electoral process. This power is based on section 5 of the 14th amendment and section 2 of the 15th amendment: article I, section 4, authorizing Congress to make regulations governing the time, place and manner of holding elections for Senators and Representatives, and the implied power of the Congress to protect the integrity of the presidential election process. *United States v. Classic*, 313 U.S. 209, 315; *Burroughs v. United States*, 290 U.S. 534, 535.

As to State elections, while the constitutional authority of Congress is narrower in that it is limited to the 14th and 15th amendments, the congressional authority under the enforcement provisions of these amendments is sufficiently broad to enable the Congress to enact whatever legislation may be appropriate to carry out the purposes of the amendments. However, we believe that, inasmuch as the abuses have involved the manner of testing qualifications rather than the qualifications themselves, Federal restrictions on qualifications imposed in State elections would not be warranted. Section 2 of the bill goes beyond regulating the manner of testing qualifications; it purports to limit the kind of qualifications which may be imposed to five specific categories.

Section 3 of the bill is similar to the administration's proposal, S. 2750, in that it would provide a prohibition against the deprivation of the right to vote in Federal elections on the ground of literacy based on an unequal application of standards or procedures. The administration's proposal does not attempt to set qualifications of electors in either State or Federal elections but simply describes the manner in which literacy qualifications adopted by a State shall be administered in Federal elections. S. 2750, therefore, avoids any real constitutional problem, whereas S. 2979 in its attempt to regulate the qualifications of voters in State elections does present a serious constitutional problem.

In addition, S. 2750 in describing the manner in which literacy qualifications adopted by the States shall be administered by Federal elections, declares that literacy requirements are satisfied by evidence of a sixth grade education in any State or territory, the District of Columbia, or Puerto Rico. This would include either English speaking classes or in the case of Puerto Rican schools, Spanish speaking classes, where in the framework of Puerto Rican culture, students are taught their obligations of American citizenship, in Spanish. S. 2979, however, would require a State to certify as literate, persons who have completed "six or more grades of formal education." This is not limited to accredited schools in the United States and would include any school in any country so that a person who had 6 years of schooling in another country, but who could not speak or understand the English language, could qualify as a voter. The Department urges therefore that the Congress give favorable consideration to S. 2750.

Section 4 of the bill, which would prohibit the denial of the right to vote in Federal elections because of "arbitrary action or arbitrary inaction," would enable the Government to invoke the injunctive powers of the courts without the difficult burden, which exists under present statute, of proving that the deprivation of the right to vote, or to register to vote, was based upon racial discrimination. This would permit the Department to proceed more expeditiously than is now possible in many situations involving racial discrimination. It could also proceed civilly in election fraud cases against voting officials and others who deprive persons of their right to vote in Federal elections.

However, this objective is reached more directly and more simply by clause (1) in section 2 of S. 2750, and it is, therefore, urged that it be given favorable consideration in that respect.

With respect to section 5 of the bill the statistics to be gathered by the Census Bureau would be useful to this Department.

The Commission on Civil Rights has also recommended that consideration be given to legislation dealing with the problems of legislative reapportionment.

Since that recommendation was made, the Supreme Court has handed down its decision in *Baker v. Carr* which deals with this issue. That decision is now being studied, and we do not believe that comment on proposed legislation in that field would be helpful until that study is completed.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

JOSEPH F. DOLAN,
Assistant Deputy Attorney General.

Mr. CREECH. Mr. Chairman, the next witness will be Mr. MacDonald Gallion, attorney general of Alabama.

STATEMENT OF MacDONALD GALLION, ATTORNEY GENERAL OF THE STATE OF ALABAMA

Senator ERVIN. Mr. Attorney General, we are delighted to have you before the subcommittee, and we appreciate your coming.

Mr. GALLION. Thank you, sir.

To identify myself first, my name is MacDonald Gallion. I am attorney general of Alabama.

The distinguished chairman of the Subcommittee on Constitutional Rights requested me as chief law enforcement officer of my State to express my opinion on the constitutionality and desirability of two proposed bills designated as S. 2750 and S. 480. These measures relate to literacy requirements as conditions for voting.

I am grateful for the opportunity to express my views.

Before considering the important questions presented, I find it essential to state that in the field of civil rights and in particular matters pertaining to Negroes, there are no legal precedents which the Federal judiciary considers binding.

In my State two members of a three-judge district court refused to follow *Plessy v. Ferguson*, and ruled unconstitutional laws which provided for the segregation of races on buses. The majority stated in effect that they could "perceive" that the Supreme Court of the United States would so hold when presented with such a case. Thus, this "power of perception" granted to itself by a district court has overruled *Plessy*, and its action has been affirmed by the Supreme Court without opinion.

Then again in the field of voting rights and under the Civil Rights Act of 1960, and in spite of *Lassiter v. Northampton Election Board* (360 U.S. 45), a Federal district judge in Alabama has ruled that a board of registrars may not require an applicant for registration to read or write any article of the Constitution of the United States of over 50 words. This in spite of our State constitution which says that an applicant may be required to write any article of the said Constitution.

Also, though the State constitution plainly states that an application for registration in the form of a questionnaire is an aid only in determining qualifications, a Federal district judge has ruled Negro applicants qualified from the application alone and has ordered them placed upon the registration lists as qualified electors. The questionnaires cannot possibly show good character which is a State constitutional prerequisite, and all of this without following the procedure provided in the Civil Rights Act of 1960.

This office, and I am speaking of the attorney general's office of the State of Alabama, has never known or heard of a case before where the district judge registered from the bench. It was always thought that registration was a State matter to be handled by State officials, subject only to a decree of court, where necessary, that registration be not denied because of race or color.

Again, the Fifth Circuit Court of Appeals has just ruled that upon demand of the Attorney General of the United States based upon information in his possession that the registrars of Wilcox County, Ala., have discriminated in the registration of voters, the voting records must be produced for inspection even though the record shows by affidavits that no Negroes have applied for registration in 50 years or more. How can the registrars discriminate when only one race has applied for registration?

The Federal courts go to any length to support any Negro case sponsored by the Attorney General of the United States.

These various decisions and others have led me to the conclusion that nothing heretofore decided by the Supreme Court of the United States will deter the Federal courts from upholding the validity of proposals such as presented by S. 2750 and S. 480 if they become law.

It is just as clear that both the Congress in passing such acts and the Supreme Court in later upholding them will be usurping the rights of the States and acting in a manner never before contemplated or permitted by the Constitution of the United States, or sanctioned by prior court decisions.

In order therefore to help in some degree, may I be permitted to suggest that the Congress spell out clearly what it does pass, if it passes anything, so that the Federal courts may not, as they have been doing, give broader and greater rights than even those contemplated by Congress in the civil rights field.

S. 2750 AND S. 480

(a) The Federal Government is now doing everything necessary and proper to secure and protect the right to vote. In fact, Alabama feels that the Government is itself guilty of discriminating in this field for no action of any kind has been taken for white people.

In a suit now pending for decision in Montgomery County, Ala., the United States asked only for certain Negroes to be considered as qualified, ignoring the whites, although the evidence showed that the applications of both whites and Negroes had been rejected for the same and similar technical errors.

(b) The laws presently in effect are adequate to assure that all qualified persons shall enjoy the right to vote.

(c) In some of the Black Belt counties of Alabama, on any Saturday afternoon in towns such as Eutaw, Uniontown, Selma, and Greensboro, personal visits to those areas would demonstrate that not 1 in 50 Negroes with sixth-grade educations are literate in the sense of possessing knowledge or judgment relative to the voting process.

I do not think that stems from an imbalance of educational opportunity, but an imbalance of ability to absorb and retain.

As to just why one is literate for voting purposes after six grades but illiterate after five grades may forever remain an executive, legis-

lative, and judicial mystery. In some cases literate means "instructed in letters," "educated," while in others if you can read and write you are "literate."

(d) There are now no arbitrary and unreasonable restrictions on the right to vote which may not be corrected by proper action under the laws as they now exist.

I cannot subscribe, as attorney general of my State, to any law which in effect authorizes the use of a "throw net" to catch all in the voting rights field.

Those who advocate the passage of the pertinent bills are in reality saying that the test for qualification is that you are a member of the Negro race. All else is window dressing.

The Attorney General of the United States just got through saying that the main objective of these bills was aimed at six particular States, and the concern was strictly with Negroes.

He has already stated the purpose of it and all the other, of course, is merely window dressing.

Any consideration of the constitutionality of the proposed bills begins with the fundamental fact that, under our constitutional system, the qualifications of voters is a matter committed exclusively to the States.

Senator Ervin, you went into the case of *Pope v. Williams*. I will not quote that at length, but I do want to quote one portion of it.

In *Pope v. Williams*, 193 U.S. 621, it is said:

The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper * * * The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, *supra*, "such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States". Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; * * * The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. * * *

* * * The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

The reasons which may have impelled the State legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them.

Like language is used in *Guinn, et al. v. United States*, 238 U.S. 347. It is particularly noted that the court there said:

No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of State judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision.

Literacy tests for prospective voters have been in effect in this country for a century. In *Lassiter v. Taylor*, 152 F. Supp. 295, attention is drawn to the fact that 19 States, and I believe the Senator mentioned 21, but only 7 of which are Southern States, prescribe literacy tests.

It must be conceded that it is proper for a State to enact literacy requirements for voting.

To me that concession is bound to include the unquestioned concept that it is the States that have plenary and exclusive power to determine what is reasonable and proper.

Senator ERVIN. Do you not agree with me that the fact that we adopted the 17th amendment, prescribing exactly the same qualifications for voters, for Senators and Congressmen, as section 2 or article 1, that that amounted to a reaffirmation of that sole act of providing that the qualifications rested with the States?

Mr. GALLION. Absolutely; and it could not be interpreted in any other way, Senator, in my viewpoint except as a reaffirmation.

Senator ERVIN. Do you not also agree with me that the adoption of the 15th amendment, to restrict the denial or abridgement of the right to vote on account of race and, then, the 19th amendment, on account of sex, was a recognition by Congress that the only proper way to deal with any question of qualifications was by congressional amendment rather than statute?

Mr. GALLION. It was clearly spelled out; yes, sir.

In this case, you did mention this also, and that is *Lassiter v. Northhampton Election Board*—I believe that was a North Carolina case, incidentally, but that is a 1959 case, and that supports the view, and it was there expressly held by the present court that a literacy test applicable to all alike, irrespective of race or color, was constitutional and valid.

If these bills pass, the Supreme Court may well say, as in *Brown*, that this is the first time that the power of Congress in this field has come squarely before us.

So, my conclusion is that the courts may make constitutional that which is clearly unconstitutional and to avoid any such result and to avoid further destruction of the Constitution and injury to my State, the bills should be defeated.

They are neither constitutional nor needed.

Now, I would want to make a statement, also. Since looking into these bills, as I was requested to do, Senate bill 2979 has been introduced, and I would like also to oppose the passage of that particular bill.

In my original statement, the view was expressed that no reliance whatsoever may be placed in having the Supreme Court of the United States to declare these and similar proposals to be unconstitutional. The personal views of the members of that Court, so recently expressed, have superseded constitutional principles.

If the Congress of the United States passes these proposed bills, they will be declared constitutional, in my opinion, by the Supreme Court. The fact that they are unconstitutional makes little difference to that Court.

The duty which the Congress is therefore called upon to perform becomes even more solemn in the wake of the recent Supreme Court decisions.

These proposed bills seeks to have validity attached to them by the simple expedient of calling them appropriate legislation to enforce the applicable provisions of the 14th and 15th amendments to the Constitution of the United States.

And we heard the Attorney General of the United States present that at length, and I am strongly in disagreement with him, and I think you have covered that ground, Senator Ervin, yourself in the discussion which you had, and I will not go into that.

But, clearly, they cannot be appropriate legislation implementing the applicable provisions of the 14th or the 15th amendments. I think that is clear.

At least two things are immediately manifest: firstly, there can be no appropriate legislation which runs contrary to other provisions of the Constitution; and secondly, the legislative branch of the Government is making a judicial finding of discrimination in the voting field because of race or color.

They are invading the judiciary in that determination.

Senator ERVIN. That is one of the horrible things about this bill, in my judgment.

I think you will agree with me that any controversy which involves a question of interpretation or the application of the Constitution of the United States presents a judicial question, as distinguished from a legislative question. In view of the fact that the entire judicial power of the United States is vested in the Supreme Court, the efforts of the Congress to enact this bill represents efforts to encroach upon the power of the judiciary and discharge and usurp the exercise of judicial functions.

Mr. GALLION. Yes, sir. And, of course, you have not only your Federal laws but we have adequate State laws in our State of Alabama for registration and voting for properly qualified applicants.

While I am on that subject there, I heard the Attorney General of the United States making reference to these colored people, that some of them with college degrees were being denied the right to vote.

We deny the right to vote also to white people, some of whom have college degrees. I know of one example. I do not know whether he was making reference to it or not.

But on the question there a Negro man, with a college degree, refused to fill in on the questionnaire whether or not he had been convicted of a crime involving moral turpitude and, certainly, I think that is something that is reasonable information that the board of registrars would require, whether he be white or colored.

And upon his refusal he was repeatedly denied registration. And there are many other examples that you can draw upon.

In the Macon County case the Federal agencies determined that a group—I think some 48 or so—were entitled to register. They made findings. By order of the Federal judge, they were ordered to be enrolled on the registration books.

Of those, as Attorney General, I filed a motion to strike some 19 of them. Now, here you had a determination that they should be enrolled on the books, registration books, for voting purposes.

In filing the motion to strike some 19, it turned out that the court sustained, I believe, 10 or 12 of them because of prior criminal records.

Two had moved from the State and one was dead, and a judicial determination had been made that that individual was entitled to vote.

Certainly, there can be no dispute over a dead man.

But that is an example of many of the reasons behind some of the denials of registration.

I would like to say, also, that there is a general apathy in many counties of Alabama on the part of those Negroes there to even come in and apply, and I do not think it is incumbent upon any board of registrars to go out and run them down and to bring them in and to register them.

Suffrage is not a given right. It is a privilege. And under those circumstances, where you have no applications, I see no burden on the part of the board of registrars to go out and bring them in.

S. 2979 applies to the election of both State and Federal officers, and the right to register and vote may not be denied except for—

- (1) Inability to meet reasonable age requirements;
- (2) Inability to meet reasonable requirements as to length of residence within the State and its political subdivisions;
- (3) Legal confinement at the time of the election or registration; and
- (4) Conviction of a felony.

Now, as to the legal confinement at the time of the election or registration, right there, I would like to know just what was meant by "legal confinement."

Does it point up or does it mean insane people? That is the only interpretation I can give there except for, perhaps, someone in prison.

Senator ERVIN. And under that section, I think they would be entitled to vote provided they could escape from the hospital or prison long enough to get to the polls.

Mr. GALLION. Yes, sir, that would be true.

Now, that covers the field. What are the provisions for dope addicts, habitual drunkards? We have those provisions in our State. No drug addict, no habitual drunkard, and no insane person, or a mental incompetent. Now, that could be many, many mental incompetents that are not under legal confinements.

Many of them are in nursing homes but totally without judgment for the voting process.

Under this bill every one of those could come in.

We also have reasonable, I think, regulations as far as vagrants are concerned and tramps. You have drug addicts, drunkards, vagrants, tramps, imbeciles, all enjoying the voting process.

Now, this says "conviction of a felony." We have the requirement as to character in our State. If you are going to restrict this to felonies, what about the thief who commits petty larceny every couple of weeks or so?

Does he continue that throughout the year and then when it comes time to register and to vote he comes in and has his voting right?

That is totally unreasonable, totally unreasonable.

Reference is also made to arbitrary action or arbitrary inaction, and there again we are left without a definition as to what that constitutes.

Senator ERVIN. In other words, that "arbitrary" is sort of like the word "reasonable."

I am inclined to think a person is arbitrary and unreasonable if he does not agree with me on all propositions.

Mr. GALLION. Yes, sir.

Senator ERVIN. And that leaves it, certainly, for the election officials to sail out on the sea of uncertainty with no chart or compass to guide them there.

Mr. GALLION. You might have different interpretations by different courts as to what is arbitrary and as to what is reasonable.

I think that these things should be spelled out.

This bill is dangerous in its loose form. I would like to say this, too—

Senator ERVIN. Is that not the reason we have a written Constitution today?

As the Supreme Court declared in the *South Carolina* case, we have a written Constitution so as to find out what kind of government we have and what powers it has.

Mr. GALLION. Absolutely.

Senator ERVIN. Is there any constitutional basis for reading anything into the Constitution on this point except that the Constitution itself gives the States the power to prescribe the qualifications of voters for Senators and Congressmen, and that this power is not subject to any limitations whatever except the limitations that the State, in prescribing qualifications cannot discriminate against a person on the basis of race or on the basis of their sex?

Mr. GALLION. That is all it does. That is all it does; and you cannot write something up into it.

I would want to mention the fact that in our constitution of Alabama it provides that an applicant for registration must take an oath to support and defend the Constitution of the United States and the State of Alabama, and he must state in such oath the disavowing belief in, or affiliation at any time with, any group or party which advocates the overthrow of the Government of the United States or the State of Alabama by unlawful means.

And, of course, with these provisions here in this bill that is completely knocked out.

And I ask, why should the proponents of this bill wish to deprive the State of Alabama of these American requirements?

There is one thing, too, that we have. We have poll tax in our State. It is limited. It is not unreasonable. It is cumulative for only 2 years, a maximum of \$3, a dollar and a half a year.

Now, of course, that would be circumvented by this bill here. That would be left out. It is just a means of eliminating the poll tax which this Congress has already considered.

Senator ERVIN. And which the Supreme Court itself has held is a perfectly valid exercise of the constitutional power on the part of the State.

Mr. GALLION. Yes. Now you have this by circumvention to eliminate it by this particular bill here.

The poll tax in the State of Alabama, as I say, is reasonable. I repeat that the suffrage is not a given right. It is a privilege. The accumulated feature of \$2 or \$3 is certainly in line and reasonable and, incidentally, it provides a good bit toward our schools. All of the reve-

nues from that goes to our State-supported schools, and it amounts to considerable funds for the school system.

I could go on and on, Mr. Chairman, but I think that your discussion with the Attorney General of the United States pointed up the basic disagreements that I have with these various bills.

Fundamentally, they are unconstitutional and infringe upon the constitutional rights of the sovereign States.

But, too, let me say this:

Again, it is apparent that Federal courts will be called upon time after time to determine what is reasonable or unreasonable. Why leave the States any power which may be subject to Federal judicial review? Why not go all the way and state in this very proposed bill that which is a reasonable age requirement and reasonable residence requirement? Why not define what is legal confinement? Why leave the States anything if past practices show statewide discrimination in the voting field because of race or color?

If the States have been guilty of such discrimination, why, so to speak, reduce the crime from grand larceny to petty larceny? Why not stop the stealing altogether?

Why doesn't the Congress take away completely all States rights in the voting field? If the constitutional authority exists to take away a part of those rights, it may likewise take away all.

The proposed S. 2979 is confusing on its face. In one part of the bill, a literacy test seems prohibited because only four grounds, not including literacy tests, may be used to deny registration; and in another part of the bill, the State literacy tests seem to be recognized and a sixth-grade education is made final as to literacy in the voting field.

Why not state in plain language that the States do have the right even under this proposed bill to fix literacy requirements not in conflict with section 3 of S. 2979?

Finally, by section 4, arbitrary action or arbitrary inaction is prohibited in the voting field. Once again the State officials are left to the Federal courts for a definition of arbitrary action or arbitrary inaction. The arbitrary inaction may be decreed by a Federal court to be the failure to seek out members of the Negro race for registration.

In concluding this brief statement, permit me to point out that the constitution of the State of Alabama provides that the Constitutions of the United States and the State of Alabama must state in such oath the disavowing belief in or affiliation at any time with any group or party which advocates the overthrow of the Government of the United States or the State of Alabama by unlawful means.

Why should the proponents of S. 2979 wish to deprive Alabama of these American requirements?

Why should the proponents of this bill wish to use an adroit means of eliminating the poll tax as provided by Alabama's constitution? The payment of 2 years' poll tax is required by amendment 96, constitution of Alabama 1901. It is not included in the four grounds of subsection 2(b) of section 2 of S. 2979 as a ground for denying the right to vote upon failure to comply. This is especially important to the States and to the Senate as a whole in view of its recent action on the poll tax question.

One could go on and on, but fundamentally the bills, all of them, are unconstitutional as infringing upon the constitutional rights of the States.

I would like to say this, that in view of the motives that are apparent behind these bills that have been referred to, that I am drawn to the inescapable conclusion that they originate out of a minority psychosis that is prevalent around Washington here today, and they seem to be punitive and vengeful acts against the South.

We have arrived at a point, it seems, where there is so-called justice by the color line rather than by constitutional principles. I think it is time that we stop running the Government by national party politics and return to a government of laws with honor and respect for our U.S. Constitution, the Constitution and principles laid down by our Founding Fathers.

If it has come to the point that only minority groups are heard and considered by the heads of our National Government, then I say that I am here representing a part of the largest minority group in the United States today, and that is the southern white people who are some 40 million strong.

And, frankly, I have become very much disturbed at these vindictive bills that seem to be aimed like daggers at the heart of the South and my State of Alabama.

I think that they are no more than mediums of political propaganda, seeking to get the votes of the Negro blocs here in the big cities of the Nation, and I think that certainly we have been under harassment down in my State.

About every time that I look up another U.S. marshal is serving me with papers.

Our voting processes are being stricken out, and we have adequate laws in force now, and there are adequate Federal laws in force, and this is just a continued harassment on the part of the Federal Government. And I strongly, strongly oppose the passage of these bills.

Not only do I question the purposes behind them, because there are already adequate laws on the books, but I think that they are clearly unconstitutional.

And I want to get strongly on record in opposition to S. 480, S. 2979, and the other one. What is that? S. 2750.

Mr. Chairman, I want to thank you for your courtesy in allowing me to testify. I appreciate the opportunity to come before you.

Senator ERVIN. The subcommittee is grateful for your coming before us and giving us the benefit of your views.

It seems to me that we have about reached a stage in this country when the American people and the legislators ought to read again certain great decisions where the courts have said that the reason that the Founding Fathers wrote the Constitution was so that they could put the fundamentals of the Government into practice to establish the rights of the citizens, and to put them into irrevocable laws beyond the reach of both the Government and the States in troublesome times. Also I think it is time that the American people read again the Farewell Address of George Washington to the American people in which he described how the powers of government were divided in order to preserve the liberty of our people.

George Washington said that it is just as important to preserve the constitutional principles as it was to establish them in the first place.

Do you not agree with that?

Mr. GALLION. I certainly, fully agree with you, Senator, in that.

And I might say, from the harassment that we have had in Alabama, that I can view it no more than a trend for political consumption, a trend toward carpetbagger rule in my State by remote control.

That is all it amounts to.

Senator ERVIN. There can be no question of the fact that the men who drafted and ratified the Constitution realized that history taught one indisputable truth, and that was that the people could not be protected unless they had a good Constitution which would specify how the Government was to operate and the rights of the citizens guaranteed. Is not the preservation of the constitutional principles, such as that giving the States the power to describe the qualifications of voters, for Senators and Congressmen, absolutely essential if the American way of life, that we have known and loved, is to endure?

Mr. GALLION. That is correct.

Thank you very much, sir.

Mr. CREECH. Mr. Attorney General, the statement made this morning by the Attorney General of the United States and the memorandum accompanying it, indicates that the Attorney General is relying for the constitutionality of S. 2750 heavily on article I, section 4.

This bill, of course, is limited to Federal elections.

The Attorney General has stated he supported the bill under the broad inherent power of Congress to govern the Federal elective process.

I wonder if you would care to comment on the extent of Congress' power to legislate voter qualifications under article I, section 4 of the Constitution?

Mr. GALLION. Sir, I think the only thing—that is in reference to the place and manner of holding the election, and that is all there is.

And the rest is left open and, naturally, that vacuum has been filled up by the States traditionally, and that is where it belongs. And the only other controlling factor is the place, manner, and time of holding the election.

Now, therefore, certainly there is no constitutional authority to come in on the basis of that.

There is no constitutional authority in article I.

Mr. CREECH. Your feeling is that the proponents of this bill will have to look elsewhere for their constitutional basis?

Mr. GALLION. They will have to look elsewhere, and I do not think they will find it anywhere in the Constitution.

Mr. CREECH. Sir, several proponents of the bills, which are before the subcommittee, have stated that although the Supreme Court has allowed literacy tests to stand in the *Guinn* case and the *Lassiter* case, that the Court has not passed upon the power of Congress to regulate literacy tests by finding that such tests are being used to discriminate.

Now, these witnesses conclude that the cases which I have cited, the *Guinn* case and the *Lassiter* case, and others, are irrelevant, and that the bills can be sustained under the enforcement clauses of the 14th and 15th amendments.

I wonder if you would care to comment on that argument?

Mr. GALLION. I did not hear the contention that those cases were irrelevant.

Mr. CREECH. I do not mean, sir, that that contention was the Attorney General's.

We have heard a number of witnesses, and this is a statement which has been made by several witnesses.

Mr. GALLION. Yes; I say I haven't heard those cases mentioned as being irrelevant. Indeed, they are not irrelevant.

They are right on point and certainly it was a recognition on the part of the Supreme Court of the constitutionality of the literacy tests and, indeed, at the State level.

It was the recognition of that fact.

Mr. CREECH. The *Lassiter* case which, of course, is directly in point, was a unanimous decision of the Supreme Court, in 1959 upholding the constitutionality of the literacy statutes of North Carolina.

It has been said, by some of these witnesses, that the decision indicates that Congress has the constitutional authority to pass these bills and a section of the opinion to which they refer is this, sir.

It says that while the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of State standards which are not discriminatory, and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

I wonder, sir, would you comment upon this assertion?

Mr. GALLION. Well, as you state, that was a unanimous opinion held so by the Supreme Court of the United States, and I do want to point up again that date. That date it was decided was June 8, 1959.

Now, the Supreme Court held in that case, and I would like to quote a bit there also, that there was no constitutional defect inherent in the North Carolina statute on its face, since a State may properly conclude that only those who are literate should exercise their franchise.

So, clearly, when you have an expression, by the U.S. Supreme Court, as late as June 8, 1959, recognizing the rights of the States in this field, it certainly points up the encroachment of the Federal Government when they now seek to come in and knock out all of those sovereign rights of the State.

Senator ERVIN. Cannot this bill be summed up that it is unconstitutional on each of these grounds?

In the first place, these bills attempt to apply to State and local elections as well as congressional elections, and they invade the area in which the State has the absolute power to prescribe the qualifications of its voters under our system of government, irrespective of the Federal Constitution.

Secondly, this bill is unconstitutional insofar as the original Constitution is concerned and the 17th amendment, because those two provisions, expressed by the simplest language in the Constitution, that the right to prescribe the qualifications of voters for Senators and Representatives belongs to the States.

In the third place, are these bills not unconstitutional under the 15th amendment, first, because the operative parts of these bills are

not restricted to the denial of the right to vote on race and color, and previous condition of servitude, and, secondly, because even if they had been so conditioned, they are not confined in their operation to that requirement?

Mr. GALLION. I think that is an excellent——

Senator ERVIN. And they do not constitute a program for enforcement of the amendment for that reason?

Mr. GALLION. I think that is a very excellent summation, Senator.

Of course, with the suits and all that I have had in the State of Alabama, I will go a step further and just say very bluntly that these bills are introduced for political propaganda, and we are tired of that in the State of Alabama.

They are vindictive in nature. The present laws are adequate on the Federal statute books and our State statute books.

Mr. CREECH. Sir, I know that you have commented in your supplemental statement on S. 2979. That bill, of course, would make it unlawful for a person, acting under cover of law, to interfere with the right of a person or, by the same token, not acting under the cover of law, to interfere with the right of a person to cast his ballot in State elections.

Is there any constitutional basis for this?

Mr. GALLION. No; not that I can determine.

I cannot see anywhere in our Constitution any reasonable basis for that insertion in S. 2979.

Mr. CREECH. The 14th and 15th amendments, which have been cited as a basis for this legislation would, of course, apply only to the States; is that correct, sir?

Mr. GALLION. Yes.

Mr. CREECH. And the article I, section 4, would only be applicable to Federal elections in your view?

Mr. GALLION. That is correct. That is correct, sir.

So any way you look at it, I am in strong opposition to these bills.

They clearly are fundamentally unconstitutional. I view them as vindictive toward the South. I view them as political propaganda measures.

I view them as unnecessary because we have adequate Federal laws and adequate State laws already enrolled on the statute books.

Mr. WATERS. Mr. Attorney General, do you believe the Supreme Court would declare the bill to be constitutional?

Mr. GALLION. So far, in the voting rights field, they have certainly had a very liberal viewpoint, and from the past recent decisions, that would be my personal conclusion.

Mr. WATERS. You believe they would hold this to be constitutional?

Mr. GALLION. I would say that I think perhaps they would. As far as I am concerned as a lawyer, I think they are clearly unconstitutional, though.

Mr. WATERS. Thank you.

Senator ERVIN. But do you believe the Supreme Court would hold them unconstitutional if the Court still retains its international integrity and judicial stability?

Mr. GALLION. Well, certainly, and if they travel on established legal precedents.

Senator ERVIN. The subcommittee appreciates very much, Mr. Gallion, your coming before us and giving us the benefit of your views.

Mr. GALLION. Thank you, sir.

Senator ERVIN. The subcommittee stands in recess until 2:15.

(Whereupon, at 1:30 p.m., the subcommittee was recessed, to reconvene at 2:15 p.m., of the same day.)

AFTERNOON SESSION

(Present at this point: Senator Ervin (chairman) presiding.)

Senator ERVIN. The subcommittee will come to order.

I regret very much that Mr. Frederick T. Gray, who is a member of the Commission on Constitutional Government of Virginia and a former attorney general of Virginia, is unable to remain on account of previous engagements to give his testimony in person. Mr. Gray is one of the ablest constitutional lawyers in Virginia, and, in order that the citizens may have his views on the proposed legislation, I am going to place in the record at this point his written statement and direct that it be printed in the record as if it were delivered in person.

(The complete prepared statement of Mr. Frederick T. Gray is as follows:)

SENATE BILL 2750

In recent years those of us who believe that our Constitution is, and ought to be, a sacred compact between the people and their Government have on many occasions trembled with anxiety as the Nation's highest tribunal deliberated on the meaning of words in that document. We have been appalled at times when the Court has permitted "changed conditions" to change the meaning of the Constitution itself. The proponents of Senate bill 2750 have been among those who have applauded such actions by the Court and have sought to relegate criticism of it into the category of near treason by chanting, almost as though in unison, "supreme law of the land" and by reminding us that we are sworn to uphold and defend the Constitution and that the Court's decisions "are the Constitution."

What say these ardent advocates of the Court to its 1959 pronouncement in the case of *Lassiter v. Board of Supervisors* (360 U.S. 45)? There a unanimous Court, speaking through Mr. Justice Douglas, upheld the literacy test for voting prescribed by the laws of North Carolina and said, among other things:

"In our society * * * a State might conclude that only those who are literate should exercise the franchise."

This, of course, was not an unprecedented decision. I will point out in the course of these remarks several other occasions on which the Court has held similarly. Perhaps in one respect the decision is surprising, that being that it is the same view held by the Court over the years—certainly as far back as 1884.

In an examination of proposed legislation such as Senate bill 2750, it is all too easy to make broad generalizations as to the merit or lack of merit of the proposed law. I shall not pause to question the fairness of a nationwide standard calling for the completion of six primary grades when there is no provision for uniformity of school levels throughout the Nation. It may be that the one with a sixth-grade education in one State will have been required to reach a much higher degree of literacy than one who completed that grade in another State. One might go further and ponder the compounding of that "unfairness," if such it be, when such persons change residences from one such State to another.

I suspect that a number of the bill's proponents will support it on the ground that the right to vote is basic to our concept of a democratic republic, and, therefore, all citizens of the Nation should be subject to uniform voting laws. If Senate bill 2750 is enacted into law and the principle established that Congress can control the requirements for voting in the States, surely these worshippers of uniformity, who believe that the term "States rights" is equivalent to "abuse

of the individual" and who believe that only the Federal Government can protect individual liberties, surely they will be quick to contend that under that power Congress must act to eliminate the unfairness I have mentioned by standardizing education throughout the land—under Federal control, of course.

I shall not deal here with an argument as to the merits, or lack of merits, of uniformity. Those who support this measure with that argument miss the point. It is an argument which can only be properly made in support of an amendment to the Constitution. Conversely, many who place their confidence in the true Federal system of dual government may tend to generalize that under the 10th amendment, control of the franchise is reserved to the States, as it is not a power delegated to the General Government. They err by relying on a general provision when the true bar to Federal control here can be pointed out in more specific language. The authors of the Constitution of the United States dealt with the exercise of the franchise in five separate sections of the document: Article I, section 2; article I, section 3 (which was repealed in part by the 17th amendment); article I, section 4; article II, section 1, clause 2; and article II, section 1, clause 3. Four of the 23 constitutional amendments have been totally or partially devoted to that problem. They are the 14th, 15th, 17th, and 19th amendments. The 12th amendment, dealing with the electoral college, and the 23d amendment, conferring on residents of the District of Columbia the right to vote in presidential elections, are not considered strictly applicable to this discussion and thus are not included in the enumeration.

I submit, therefore, that a calm and rational review of the Constitution and its amendments, together with the constitutional debates and judicial decisions on the question, will set forth clearly the authority or lack of authority of Congress to enact the proposed bill into law. My conclusion, after detailed consideration of the authorities, is that Congress lacks power under the Constitution to enact the proposed legislation.

Senate bill 2750 is simply a bill to set minimum literacy requirements which, having been met, entitle an individual to vote in "Federal" elections without further testing by any State. A Federal election, according to the bill, is any "general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions." It is true that lines 5 through 14 at page 3 of the bill prohibit such acts as coercion or application of unequal standards to persons who attempt to vote in Federal elections, but these acts already are prohibited by statute and case law, as well as by constitutional amendments. I refer to the Civil Rights Act (42 U.S.C. sec. 1971(b) (1961)) and the cases of *United States v. Raines* (302 U.S. 17 (1960)) and *United States v. McElveen* (177 F. Supp. 355 (E.D. La. 1960)). The only apparent reason for the provisions in lines 5 through 14 of the bill is that they lend some authority to the proposed law by incorporating standards which previously have been approved. The important portion of the bill is clause (2) of paragraph (b), comprised of lines 15 through 21 on page 3. Reduced to its essential provisions, this clause outlaws the literacy tests of the several States by providing that if any person shall have a sixth-grade education, and shall not have been adjudged incompetent, that person shall not be denied the right to vote.

As authority for congressional action of this nature, the authors rely upon "article I, section 4, of the Constitution; section 5 of the 14th amendment, and section 2 of the 15th amendment; and its (Congress) power to protect the integrity of the Federal electoral process * * *." In examining the authority relied upon, I shall first analyze in detail the authority of Congress under article I, section 4, to control the times, places, and manner of holding elections for U.S. Senators and Representatives. Next I shall consider the propriety of the proposed legislation under the 14th and 15th amendments. Finally, I shall touch upon currently existing civil rights laws and some special considerations applicable to presidential elections.

Article 1, section 4, states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

It cannot be disputed that Congress can regulate the times and places of holding elections for Senators and Representatives, within the limits set. The problem arises over the interpretation of the word "manner." Webster's preferred definition of the word describes "manner" as "a way of acting, a mode of pro-

cedure." This throws little light upon the usage of the word, and one is justified in concluding that "manner," as used in this instance, refers to the how, when, and where of the election. Absent indications to the contrary, then, the ambiguous nature of the word might lend support to the theory that Congress has final control of the time, place, and general conduct of each election for a Senator or Representative. However, as previously stated, the Constitution is specific with regard to voting rights, and article 1, section 2, provides that:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Obviously, the Constitution contemplates that each State will fix its own qualifications.

The same provision as to qualifications to vote in elections for Senators was adopted by the 17th amendment in 1913, which provides: "The electors (for Senators) in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

A normal interpretation of this section reveals clearly that while Congress may control the general proceedings as to time and place of a congressional election, each State is to set its own qualifications which must be met by individuals who seek to exercise the franchise. Under article 1, section 2, the Thirteen Original States were admitted to the Union with varying laws as to qualification of voters, and States subsequently admitted brought with them their own laws as to that qualification. For example, Massachusetts required of a voter "a freehold estate * * * of the annual income of three pounds, or any estate of the value of sixty pounds"; Connecticut qualified only such persons as had "maturity in years, a quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate"; New Jersey denied the franchise to any save "all inhabitants * * * of full age who were worth fifty pounds * * *." Of course, the States are prohibited by the 15th and 19th amendments from discriminating on the basis of race or sex.

The purpose for which article 1, section 4, was intended is disclosed by an examination of the attitude prevailing at the time of adoption of the Constitution. In conventions called by the Thirteen States to ratify the Constitution, amendments were proposed to limit the power of Congress under article I, section 4, to cases where the States neglected or refused to make provisions for Federal elections. It was contemplated that in case any State sought to withdraw from the Union by failing to elect Senators or Representatives, Congress should have power to set the time, place, and procedure for its own elections. Although a majority of the States—Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia—supported such an amendment, they took no action because of assurances that Congress would not overstep its authority by attempting to control State election procedure. In this regard, James Madison said, "The election of the House of Representatives * * * will probably, forever be conducted by the officers, and according to the laws of the States." It should be noted that at that time, election of Senators was by State legislatures, so that there was no question of Federal control of those elections. Ninety-two years later, in the case of *Ex parte Clarke* (100 U.S. 399), Justices Fields and Clifford stated that clarification of article I, section 4, was "abandoned upon the ground of the improbability of congressional interference * * *."

In the debates of 1842 concerning the power of Congress to provide that elections of Representatives should be by districts (which power cannot be made analogous to the power to prescribe vote qualifications), Mr. Nathan Clifford of Maine, later a Supreme Court Justice, referring to the opinion of John Jay, said Jay believed:

"That every government was imperfect, unless it had the power of preserving itself. Suppose that, by design or accident, the States should neglect to appoint Representatives * * *. The obvious meaning of the paragraph (art. I, sec. 4) was, that if this neglect should take place, Congress should have the power, by law, to support the Government and prevent dissolution of the Union."

Mr. Clifford then referred to an opinion in which Mr. Samuel Adams of Massachusetts expressed the same view. Both of Mr. Clifford's statements may be found by reference to the Congressional Globe, 27th Congress, 2d session, at the appendix, page 349. Clearly, then, Congress was intended to have the power to schedule elections in the event that the States neglected to provide for elections.

In a committee report of the House of Representatives in 1901 concerning a disputed election, the committee decided that:

"The best opinion seems to be that * * * the constitutional provision (art. I, sec. 4) was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has neglected or refused to make such provision itself."

The report is cited as House of Representatives Report No. 3000, 50th Congress, 2d session (1901). The same report, at page 3, quotes a report by Mr. Webster in the 22d Congress:

"It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give one portion of her territory a representation for every 25,000 persons, and to the rest a representation only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the State itself."

If any doubt should remain as to the question, it must be eliminated by a passage of Alexander Hamilton's explanation of the Constitution. Hamilton, who was hardly a State's righter, analyzed for the people of New York the question of which government should prescribe qualifications for voters in "Federal elections." While the passage refers to property qualifications, it is equally applicable to all other qualifications which might be required. Writing of the power to set qualifications for electors, Hamilton stated:

"But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. [Emphasis in original.] The qualifications of the persons who may choose or be chosen, as had been remarked on other occasions, are defined and fixed in the Constitution, *and are unalterable by the (national) legislature.*"

In Virginia, Patrick Henry suggested that article I, section 4, might place in the hands of Congress power to establish qualifications for electors and elicited this reply from Governor Randolph:

"As the electors of the Federal representatives are to have the same qualifications with those of this State legislature—or, in other words, as the electors of the one are to be electors of the other—this suggestion is unwarrantable, unless he (Henry) carried the supposition farther, and says that Virginia will agree to her own suicide * * *."

The necessary conclusion to be drawn from this testimony by Madison, Hamilton, Governor Randolph, and others is that so long as laws must be made by men, citizens of States might just as well rely for local regulation upon their State legislature. In their wisdom, proven by our 173 years of experience with the Constitution, the authors of that document made just such a division in control of the franchise in article I, sections 2 and 4.

In 1842, Congress first exercised its power under article I, section 4, by providing that elections of Members of the House of Representatives should be by districts rather than at large. The several States at that time employed varying methods of election, and a heated controversy accompanied consideration of the legislation. Proponents of congressional district-vote legislation maintained that some States were using their power to hold at-large elections for Representatives to insure that the State's majority party would have great bloc-voting power in the House of Representatives. Therefore, they said, it was time for Federal action to remedy the situation. A great many statesmen objected to the inference that Congress was more competent than the State legislatures to handle the problem. One of these men, Mr. Nathan Clifford of Maine, made a rather pointed suggestion to a Congressman from New York who favored Federal action. Asking the question why the States needed help from the Federal Government, Clifford said, "Why? Because the legislation of the States is unwise, in the opinion of a majority here. This is the creature arraigning and condemning the creature. Are not the people of New York, or of any other State, as competent as the Members of this House to judge as to which system will best promote their interest and prosperity? If the gentleman thinks otherwise, let him go home and promulgate that doctrine among the people, or in the legislature, and see how many votes he will get to sustain him in the sentiment; and perhaps hereafter, he will be more competent to decide as to their wishes upon the point in dispute." (Congressional Globe, 27th Cong., 2d sess., 350 appendix (1842)). Mr. Clifford's remarks would seem to be applicable to the voter qualification legislation currently under consideration.

In the question whether Congress under its power to regulate the manner of elections can compel States to elect Representatives by districts, the only power designated by the Constitution is found in article I, section 4. There is no express reservation of power to the States. The power to determine qualification of electors is expressly reserved to the States in article I, section 2. Therefore an argument which holds that Congress has power to require district elections for Representatives is not authority for the contention that Congress has power to set qualifications for electors.

Despite the fact that there was a tremendously stronger case for Congress to require elections by districts than there is for Congress to establish voter qualifications, the district voting law was seriously challenged. For a summary of objections to the district voting law, see Paschal, "The House of Representatives: 'Grand Depository of the Democratic Principle.'" The results of the constitutional controversy indicate that Congress itself had little faith in its authority to pass the district-vote legislation, for, although Congress had the power to deny seats to unqualified members under article I, section 5, of the Constitution, Members from four States were seated in the following session despite the fact that they were elected at large. Georgia, Mississippi, Missouri, and New Hampshire refused to elect Representatives by districts, but their Representatives were seated nonetheless. New York and Ohio, although they decided to vote by the district method, passed resolutions which denied the power of Congress to require that form of election. And even though the district-vote requirement remained on the books for almost 90 years, Congress never denied seats to Representatives elected at large. Thus, the first attempt by Congress to expand its power in the field of election control produced results which can scarcely be comforting to the proponents of Senate bill 2750.

In the wake of the Civil War, Congress launched an effort to enact legislation which would secure to all the newly freed slaves the right to vote, as well as other civil rights. Some insight into the propriety of this type of legislation is revealed by the fact that most of it was either held unconstitutional or was repealed within 24 years. You may be interested in an account of the bad administration of the Enforcement Act contained in U.S. News & World Report, February 10, 1960, pages 45, 46. But some of the laws, notably those prohibiting officials of government from discriminating on the basis of race or previous condition of servitude, were held constitutional. It is important to note that the Supreme Court, even as it upheld the newly created Federal power to act in the area of voting rights, found occasion to specify that the rights protected were the rights of qualified voters. I reemphasize that a qualified voter is one who has "the qualifications requisite for electors of the most numerous branch of the State legislature."

Thus in *ex parte Yarbrough* (110 U.S. 651), at page 663, a unanimous Court, speaking in 1884, acknowledged that the States:

"Define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for Members of Congress."

To the same effect is *Wiley v. Sinkler*, (177 U.S. 58 (1900)).

In *Guinn v. United States*, 238 U.S. 347, decided in 1915, the question was the validity of a combined literacy test and "grandfather clause" under the 15th amendment. In the course of its opinion, the Court said:

"No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision * * *."

In *United States v. Classic* (313 U.S. 299, in 1941), the Court held that primary elections are an integral part of national elections and therefore fall within the realm of some Federal control. But in referring to the right of citizens to vote, the Court did not neglect to stipulate that the right belongs to qualified voters:

"The right of *qualified* voters to vote in the congressional primary in Louisiana * * * is thus the right to participate in that choice (of a Congressman)." [Emphasis added.]

In the same opinion, the Court in passing upon a law making it a crime to discriminate against a prospective voter stated:

"So interpreted, section 20 applies to deprivation of the constitutional rights of *qualified* voters to choose representatives in Congress." [Emphasis added.]

My only purpose in referring to the language of these cases is to demonstrate that the U.S. Supreme Court has always, either expressly or impliedly, recognized that the qualification of electors is a matter separate and apart from the time, place, and manner of an election. Furthermore, the Court has always recognized the power, vested in the States by the Constitution, to set their own voter qualifications within the limits of the 15th and 19th amendments. It would be impossible to note all the occasions upon which the normal interpretation has been placed upon the two sections of article I. However, it is interesting to note that "The U.S. Constitution: Text With Analytical Index," presented by Mr. Celler, chairman of the House Committee on the Judiciary, carries a heading, "Electors for Members of the House of Representatives—Qualifications of." There, reference is made to article I, section 2, but no mention is made of section 4. (H. Doc. No. 206, 87th Cong., 1st sess., 1961.)

Before leaving article I, section 2 and 4, I would like you to consider the following sentence and place your own interpretation upon its words. The sentence is:

"Congress shall control the time, place, and manner of holding elections for Senators and Representatives, but the qualification of those who vote shall be determined by the States."

This is precisely what the U.S. Constitution provides, and I submit to you that there is only one interpretation which may be placed on those words.

Let us turn now to a consideration of the power of Congress under the 14th and 15th amendments, and first let us deal with a preliminary question.

The bill under consideration is avowedly aimed at the prevention of racial discrimination in fixing the right of individuals to vote in "Federal elections." Therefore, if the 14th amendment did not have as one of its purposes the elimination of this discrimination, S. 2750 may not be passed under the authority conferred on Congress by that amendment. I will not impose on your patience by reading the text of the amendment. However, I would like to urge the Congress and the courts to adopt a practice of carefully considering the specific language of the Constitution and its amendments every time they rely upon them. There should be no doubt that the 14th amendment did not have as one of its purposes the elimination of racial discrimination in voting.

With regard to the first section of the amendment, the Supreme Court in 1874, in *Minor v. Happersett* (88 U.S. 162), held:

"It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."

In *Terry v. Adams* (345 U.S. 461), Mr. Justice Frankfurter stated:

"The 15th amendment, not the 14th, outlawed discrimination on the basis of race or color with respect to the right to vote."

This case history strongly indicates that, whatever may be the current trend of decisions, the 14th amendment was not adopted for the purpose of prohibiting racial discrimination in respect to the right to vote. If that had been the effect of the 14th amendment, there would have been no need for passage of the 15th amendment. It has been accurately stated that section 2 of the amendment was adopted because it was impossible to get the States to surrender their power over the franchise. Therefore, the authors of the amendment proposed and secured adoption of a provision which would decrease a State's representation in the event of the State's passage of discriminatory voting laws. In any event, that section of the amendment provides its own penalty for its violation so that no additional provision by Congress would be authorized.

Thus far in the discussion of the 14th amendment, I have endeavored to show that it was not intended to authorize any general legislation by Congress concerning voting rights. This is true, I submit, because section 1 of the amendment does not concern voting rights, and section 2 prescribes its own penalty for failure to observe its provisions. But I have not gone into great detail on the point, because now I shall establish that, even if the 14th amendment does authorize some congressional legislation as to voting rights, it does not extend authority to enact the provisions of S. 2750.

The references in S. 2750 to the 14th and 15th amendments are to the sections which provide that Congress shall have power to enforce the articles by appropriate legislation. While it is true that these clauses confer on Congress rather broad power, it is also true that there is a limit to this power. Surely no one would argue that the clauses authorize Congress to enact legisla-

tion directly contrary to the intent of the two amendments, yet that is precisely what S. 2750 would do if it were enacted.

The 15th amendment to the U.S. Constitution provides that:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

"The Congress shall have power to enforce this article by appropriate legislation."

It will be seen that if the equal protection, due process, and privileges and immunities clauses of the 14th amendment are relied upon as authority for the proposed legislation, the authority of Congress to act pursuant to these clauses is governed by the same principles as those which govern the power of Congress under the 15th amendment. In other words, since the avowed purpose of the bill is to prevent racial discrimination, the power of Congress under the first section of the 14th amendment is the same as the power of Congress under the 15th amendment.

An examination of the power of Congress to enact laws under these two amendments is in order. In the *Civil Rights* cases, the Supreme Court in interpreting the 14th amendment held that:

"The legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing * * *." [Emphasis added.]

We should consider also *United States v. Harris*, 106 U.S. 629 (1883), in which the Court said, "when the laws of a State recognize and protect the rights of all persons, the (14th) amendment imposes no duty and confers no power upon Congress * * *."

Similarly, the Supreme Court has said, in *United States v. Reese*, 92 U.S. 214, in 1876, that the 15th amendment does not confer authority:

"To impose penalties for every wrongful refusal to receive * * * (a) vote * * * (but) only when the wrongful refusal * * * is because of race, color, or previous condition of servitude * * *."

Or, phrased in another manner, the 15th amendment only confers on Congress authority to penalize State action under color of laws which States are constitutionally prohibited from making or enforcing.

The cases from which the two preceding passages are taken were decided in 1876 and 1883 by two courts intimately familiar with the purposes sought to be accomplished by the 14th and 15th amendments. In the 1876 *Reese* decision, the Chief Justice was Morrison R. Waite; associates were Clifford, Miller, Field, Bradley, Swayne, Davis, Strong, and Hunt. The *Civil Rights* cases were decided 7 years later with the same Chief Justice on the bench, and the following associates: Miller, Field, Bradley, Harlan, Woods, Matthews, Gray, and Blatchford. The opinions set forth relatively simple tests which must be applied in determining the power to be exercised by Congress under the amendments. It is therefore proper to examine S. 2750 in the light of these requirements.

Stated simply, the purpose which is sought to be accomplished by the bill is the outlawing of State literacy tests, and, incidentally, State-required poll taxes. Therefore, under the rules set forth by the Supreme Court, if the State literacy tests and poll taxes are prohibited by the 14th or 15th amendments, S. 2750 is a proper exercise of the power of Congress. But if these State laws are not prohibited by the Constitution, Congress lacks the power necessary to enact S. 2750.

Literacy tests required by States of prospective voters have been repeatedly upheld. I have referred already to *Lassiter v. Board of Supervisors*, 360 U.S. 45 (1959). Other decisions are *Williams v. Mississippi*, 170 U.S. 213 (1898) and *Williams v. McCully*, 128 F. Supp. 897 (W.D. La. 1955). In the *Lassiter* case, the Supreme Court considered a North Carolina statute which provided that every person presenting himself for registration should be able to read and write any section of the Constitution of North Carolina in the English language. In pronouncing the test a valid exercise of the State's power, as I have said, Mr. Justice Douglas, writing for a unanimous Court, held that:

"In our society * * * a State might conclude that only those who are literate should exercise the franchise."

In other words, the States are not precluded by any clause of the Constitution or its amendments from making such laws. Since Congress is restricted from making laws in the premises except where States have made laws which they are "prohibited from making or enforcing," it follows that Congress has no power to enact a law controlling this situation.

Of course, it is not contended that a State law which provides an unreasonable or incomprehensible test, or a test that is unfairly administered, is constitutional. Such laws have been declared unconstitutional by the Supreme Court. The important point is that the Court, not Congress, held the laws unconstitutional. Congress has no authority to declare a broad range of State laws unconstitutional by enacting its own conflicting law.

Poll taxes, which also would presumably be eliminated by S. 2750, have always been sustained as a constitutional exercise of a State's power. Therefore, there could be no authority under the 14th or 15th amendment for Congress to enact a law eliminating this valid exercise of State power.

As might be supposed from this discussion, the constitutional basis of the States' power to establish voter qualifications is so well established that one objective reporter has stated in 3 Race Relations Law Reporter, page 390:

"It would seem, therefore, that the States are free to establish any requirement that they deem wise, as long as these requirements are not discriminatory nor based on sex, race, color or previous condition of servitude. As a consequence, voting rights may, and often do vary widely from State to State."

In fact, an annotated volume of the Constitution prepared for the Legislative Reference Service of the Library of Congress by Professor Corwin states that:

"The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State; subject, however, to the limitation that the Constitution in article 1, section 2, adopts as qualifications for voting for Members of Congress those qualifications established by the States for voting for the most numerous branch of their legislatures."

This statement appears in the section of the treatise dealing with the 14th amendment and would seem to apply with equal force in questions dealing with the 15th amendment. It would be difficult to make a statement which more completely denies to Congress the power necessary for the enactment of S. 2750.

For a conclusive expression of the position of the States with regard to the question, it is necessary only to look to State constitutions and laws. All the States require that each voter must be a U.S. citizen, and all States set a minimum-age requirement. Practically all States prohibit idiots, insane people, and convicted felons from exercising the franchise. A substantial number of the States withhold the right to vote from paupers. In addition, 10 States require some form of literacy test. It is error to assume that all or most of these 10 States are Southern States. Arizona, California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oklahoma, Oregon, Washington and Wyoming all require some form of literacy test.

Laws governing the right to vote have been enacted, amended, contested in State courts, and tested by long experience by the citizens of the several States since the formation of the Nation. It would be a constitutionally indefensible act for Congress to assume the duties so long exercised by the States. It cannot be successfully contended that the Members of Congress know more about proper qualifications for voters in any given State than do the members of that State's legislature. It was the realization of this fact which led the authors of our Constitution to leave the problem of voter qualification to the States.

I do not believe that proponents of the pending legislation would rely upon recent civil rights legislation as precedent for the constitutional soundness of their proposed measure. The similarities are few, and the dissimilarities are striking. Nevertheless, the possibility of such a comparison being made compels me to point out the fallacy in that line of reasoning.

I will assume arguendo that the civil rights legislation passed in 1957 and 1960 is constitutional. This is quite an assumption, but even if each phase of that legislation were completely beyond challenge as an exercise of congressional power, a decision as to its constitutionality would offer no shred of support for the constitutional validity of S. 2750. The reason is that S. 2750 deals with the qualification of voters. In the Civil Rights Acts of 1957 and 1960, great respect is accorded, so far at least as the language of the act is concerned, State laws governing the qualification of voters. Even when the law provides for the appointment of Federal referees to control procedures which have been admin-

istered by the States for the better part of two centuries in the past, the language is clear that State qualifications are to be applied by those referees.

By the words of its opening provision, the act is applicable to "all citizens of the United States who are otherwise qualified by law * * *" to vote. Following provision for the appointment of a Federal referee, Congress provided that a person discriminated against would be entitled to an order authorizing him to vote if "he is qualified under State law to vote." Subsequently in the same section, it is provided:

"The Court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified."

And finally it is expressly stated that:

"The words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State * * *"

From this brief examination of the Civil Rights Act, which on its face accepts State requirements as to voter qualification, it is apparent that the act offers no inference of support for S. 2750, which would supplant State laws as to voter qualification.

Thus far in this discussion of the right to vote in Federal elections, nothing has been said with regard to the right to vote for the President and Vice President of the United States. This is because the right to vote for these offices is so clearly a matter of State concern that no convincing argument to the contrary can be advanced. With regard to the selection of the electors who, in turn, elect a President and Vice President, the Constitution provides:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress * * *."

The words "in such manner as the legislature thereof may direct" are conclusive in determining authority for control of presidential elections. Thus in 1892 it was held, in *McPherson v. Blacker*, 146 U.S. 1, that the State legislatures may provide for election of presidential electors at large, or the election may be by districts, or the State legislatures may choose electors as they see fit. The same authority would apply in the setting of qualifications for voters. The argument for congressional control is insupportable, since the only power given Congress by the Constitution in this area is to "determine the time of choosing the electors, and the day on which they shall give their votes * * *". In an article published in the 1961 American Bar Association Journal, a member of the New York bar states that:

"There is a clear distinction between the right to vote for a presidential elector and the right to vote for a Member of Congress. The former is a right granted by the individual State * * *."

The author goes on to point out that although the right to vote for Members of Congress is a federally derived right, it is within the power of each State to prescribe suffrage qualifications. It is well established that suffrage requirements, both for elections of Members of Congress and for voters in presidential elections, are determined by the individual States, subject only to the restriction of the 15th and 19th amendments. If suffrage requirements prescribed for these Federal elections meet the requirements of these two amendments, and the Supreme Court has held that both the literacy test and the poll tax do, there is no power in Congress to revise these requirements and make them conform to a national standard.

I have endeavored to prove that Congress lacks authority to enact the proposed legislation, S. 2750. In so doing, it is not my purpose to detract from the powers given Congress in the exercise of its proper powers by fixing responsibility for solution of local problems at the State level. Surely, the people of my home State, Virginia, may petition their State government for redress if present State legislation is unsatisfactory. I submit that Jefferson, Madison, Randolph, Henry, Washington, and other statesmen of their day would not hold Virginia incompetent to solve her own problems within the Commonwealth. In a like manner, statesmen of the present day should acknowledge the competence of State legislatures to solve problems existing within the several States. This, as I understand it, was the purpose in establishing a dual system of government under our Constitution.

I do not object personally to the literacy standards prescribed in the proposed legislation. If Virginia, Connecticut, Montana, or California were to adopt those standards, no reasonable protest could be made. But I protest strenuously

against the asserted power of Congress to apply those standards to all the States.

In this great land where freedom is cherished, there are those who ardently believe that the elimination of any practice viewed by them as a social evil is an end which justifies the means. They have no fear of unauthorized Executive orders, unconstitutional laws, or judicial amendments to our Constitution. To them I say the greatest evil the world could know would be the destruction of this Nation. Let us work for social reform, let us seek perfect justice—but in so doing, let us not resort to practices which in the hands of would-be tyrants could be as ready tools for the suppression of liberty as their proponents of today find them to be in what they consider the extension of liberty. Any device that avoids the Constitution can avoid it for the purpose of withdrawing privileges as readily as it can avoid it to grant them. The first President of our country, mindful of this disposition of men to shake off the restraining bonds of the Constitution when the situation seemed to demand it or make it politically expedient, said in his farewell address:

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any particular or transient benefit which the use can at any time yield."

The provisions of S. 2750 may in the minds of some offer a transient benefit, but the precedent, if established, will eventually and inevitably operate to the detriment of the Nation.

Senator ERVIN. Mr. Bloch, Senator Goldwater was to be the next witness, and he said it would be a little time before he could get here. I believe that you know it is customary to take Senators' testimony as soon as possible, but we are going to proceed with you, and then, if he comes in, if it will not discommode you too much, we can let him replace you temporarily.

The chairman is delighted to welcome Mr. Charles J. Bloch, of Macon, Ga., to come before the committee.

Mr. Bloch is one of the most distinguished trial lawyers in America, and, in my judgment, has no superior and very few, if any, equals as a constitutional lawyer.

He has written a very illuminating book on the subject of States' rights, "The Law of the Land," which I wish I had the power to make every Member of the Senate read.

STATEMENT OF CHARLES J. BLOCH, ATTORNEY AT LAW

Mr. BLOCH. Thank you, Senator Ervin.

I have had the honor to appear before this committee on several occasions, sometimes as an official representative of the State of Georgia. This time I appear, and my appearance is unique in at least two respects:

(1) I do not appear as a representative of the State of Georgia, but I appear at the invitation of Senator Eastland and your chairman, Senator Ervin.

(2) I appear just after having had the privilege of hearing the remarks of the Attorney General of the United States in support of this legislation, which I opposed and continue to oppose.

As I understood the Attorney General, he recognizes that the States of this Union under the *Northampton County*, North Carolina case, and others which it follows, have a right to enact laws confining the right to vote to its literate citizens. In other words, to apply literacy tests.

What the Attorney General, it seems to me, with all due respect, would have the Congress do in these bills would simply destroy that power of the States by having the Congress define "literate" and make that word "literate" synonymous with having a sixth-grade education.

If the plan of these bills is enacted into law and a citizen of Georgia seeks to register to vote, and the registrars, following the Georgia law, request that the applicant read or write a section of the Constitution, which is a part of our literacy test, the applicant may decline to do so if he can prove that he has completed the sixth grade in an accredited school of any State of the Union, the District of Columbia, or Puerto Rico.

The Attorney General made some reference to a provision in the Constitution that all men are created equal. I have never seen such a statement in the Constitution, but, if it were there, it would now be changed, or it would be changed if Congress enacted this legislation to say all sixth-grade students are equal.

I think the Attorney General demonstrated the basic unconstitutionality of this plan when he expressed doubts as to its constitutionality as applied to State elections. If it is appropriate legislation under the 14th or 15th amendments, and I do not think it is, it would make no difference whether State or Federal elections were involved.

On November 9, 1961, I had the privilege of making a talk to the lawyers assembled in Birmingham, Ala., for the southeastern regional meeting. I called it "The Tangled Web." It has been reprinted in the February 1962 issue of the Georgia Bar Journal.

The general theme of it was:

Oh, what a tangled web we weave when first we practice to—deviate.
Illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure.

The Supreme Court of the United States said that in *Boyd v. United States* (116 U.S., pp. 616, 635).

The first slight deviations, the silent approaches commenced about 18 years ago.

Today, there are many lawyers and others who are not interested in the preservation of our system of government.

Today, there are others who are so anxious for one purpose or another to impose their will upon the States of the South that they care not about the effects of evasion or ignoring of the Constitution upon the American system of government.

History says that when Admiral Farragut sailed into Mobile Bay he said, "Go ahead, torpedoes be damned."

That expresses their attitude toward those parts of the Constitution which displease them, or which block their path and ambitions for power.

Mr. Justice Douglas has recently warned of this trend, although he thought those pursuing it were men of good will. Recently, on June 20, 1960, he said:

We live and work under a Constitution. The temptation of many men of good will is to cut corners, take short cuts, and reach the desired end regardless of means (*Hannah v. Larche*, 363 U.S., at p. 494).

Despite Justice Douglas' warning, this is exactly what these bills seek to do.

The provision in section 2 of S. 2750 that the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico, is one of these shortcuts.

S. 2750 was introduced January 25, 1962, and seems, in that respect, to be more pointed in its aims than S. 480 introduced the year before. Section 2 of S. 480 does not mention the Commonwealth of Puerto Rico.

Under S. 2750, so far as literacy qualifications are concerned, a person may not be deprived of his right to vote in New York, or any other State, if he has completed the sixth primary grade of a public school in any part of Puerto Rico.

It would seem that S. 2750, particularly, will affect States of the North far more than it does the States of the South, for we down home, we do not have many prospective voters who completed the sixth primary grade of a school in Puerto Rico.

Both bills, though, do affect all the States of the Union for they seek to establish a government of the ignorant, by the ignorant, and for the ignorant.

A few days ago, in discussing my proposed trip to Washington at Senator Ervin's invitation with one of my partners, he asked me if I had ever heard of the phrase "social promotion." I do not know whether that has entered into the discussions here or not. But, to be on the safe side, I asked our superintendent of schools in Macon, Mr. Julius Gholson, superintendent of the board of public education, Bibb County, to tell me something about social promotions, and he wrote me this:

Reference is made to our recent telephone conversation. This is to advise that it is a common practice with many school systems to make "social promotions." I feel quite certain that from a nationwide viewpoint—hundreds of thousands of pupils are affected by this procedure.

I am enclosing a definition of "social promotion" which was prepared by Mrs. Fielder B. Goodman, director of primary curriculum in the Bibb school system, and one of our finest professional people.

I will put that letter into the record, if I may.
(The letter referred to is as follows:)

BOARD OF PUBLIC EDUCATION,
Macon, Ga., April 6, 1962.

MR. CHARLES J. BLOCH,
Attorney,
710 Walnut Street,
Macon, Ga.

DEAR MR. BLOCH: Reference is made to our recent telephone conversation. This is to advise that it is a common practice with many school systems to make "social promotions." I feel quite certain that, from a nationwide viewpoint, hundreds of thousands of pupils are affected by this procedure.

I am enclosing a definition of "social promotion" which was prepared by Mrs. Fielder B. Goodman, director of primary curriculum in the Bibb school system, and one of our finest professional people.

If I can be of further assistance, don't hesitate to call upon me.
With kindest personal regards and best wishes, I remain
Sincerely,

JULIUS GHOLSON, *Superintendent.*

Enclosure.

SUPERVISORS OF INSTRUCTION, BIBB COUNTY SCHOOLS,
Macon, Ga., April 1962.

In compliance with the compulsory education laws of Georgia the public schools are required to enroll all children between the ages of 6 and 16 years.

Some of these children have intelligence quotients of from 30 to 60. They are unteachable; indeed, they are scarcely trainable.

It is a rather general policy to retain these pupils in each of the primary grades for a period of 2 years. At this time they are approximately 12 years old. They are then advanced, yearly, to the next grade. This is done in order that the children may be associated with their own age group. The social, physical, and emotional homogeneity sometimes precludes the behavior problem that often develops in the wide-range age groups.

Let it be understood that this group of children cannot read or write beyond the level of a first-grade pupil, often not as well as can a first-grade pupil.

This procedure is known as social promotion.

Mrs. FIELDER GOODMAN,
Director of Primary Curriculum.

Senator ERVIN. As a matter of fact, I made inquiries concerning that very matter, and most States have compulsory school laws which require persons to attend school up to the time of 14 or over, and some of them do not learn, and so the child keeps growing physically but not mentally, and they promote him socially because they do not want a 5½-foot or 6-foot student in the first grade.

And, yet, these bills would deny the State the right to refuse registration to one of these socially promoted to the sixth grade, even though he never learned anything in school and could not read or write at all.

Mr. BLOCH. That is exactly what Mrs. Goodman says in the letter that I will also put in the record, if I may, that—

In compliance with the compulsory education laws of Georgia the public schools are required to enroll all children between the ages of 6 and 16 years.

Some of these children have intelligence quotients of from 30 to 60. They are unteachable; indeed, they are scarcely trainable.

It is a rather general policy to retain these pupils in each of the primary grades for a period of 2 years. At this time they are approximately 12 years old. They are then advanced, yearly, to the next grade. This is done in order that the children may be associated with their own age group. The social, physical, and emotional homogeneity sometimes precludes the behavior problem that often develops in the wide-range age groups.

Let it be understood that this group of children cannot read or write beyond the level of a first-grade pupil, often not as well as can a first-grade pupil.

This procedure is known as social promotion.

Now, whether it exists just in Bibb County, Ga., or in the State of Georgia, or whether it is general in the other 49 States of the Union, certainly this committee can develop far better than I can, but it demonstrates just what the level of sixth-grade student means. It does not mean anything.

Senator ERVIN. As a matter of fact, as I understand it, the purpose of the first grade in school is to teach people to read and write very simple things.

But if Congress has the power to substitute an artificial standard of inserting completion school grades in lieu of real literacy tests, what would there be to prevent the Congress from saying anybody who has completed the first grade shall be allowed to vote and shall not

be subjected to any test to determine whether he can actually read and write as children in the first grade are supposed to learn to read and write?

If the constitutionality of this provision about a sixth-grader can be sustained, why could not the constitutionality of a similar requirement as far as a first-grade education is concerned be sustained?

Mr. BLOCH. They could; and anticipating myself a little bit, if they can do it with reference to schools, then why can they not do it with reference to juries?

Under your system, the system of all the gentlemen of this committee, I suppose in the various States and certainly in Georgia, our trial juries are composed of those people made up from a list of the intelligent citizens of the county. Well, now, if Congress can pass this legislation with respect to schools, then with respect to juries and grand juries, which are made up from a list that are denominated the most intelligent citizens of the county, if Congress can do what is proposed here with reference to schools, then they can say:

Now, with respect to jurors, Mr. State, you cannot have any definition of "intelligence" for your jurors except that above a sixth-grade education. We will let you have for your grand jurors, we will let them have an eighth-grade education, and that is the sum and substance of the measurement.

In the cutting of corners, the taking of short cuts, the bills detour around a case decided by the very Justice who sounded the warning in *Hannah v. Larche*.

That case, of course, is *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, decided by the Supreme Court of the United States just 3 years ago.

I recognize that it has been cited to you already in these hearings. I have heard it referred to several times this morning and, doubtless, we will continue to hear about it as these debates go along. But it is another one of those landmarks of the law which must be overturned if the proponents and advocates of these bills are to reach their desired end.

It is a declaration of the "law of the land" made by a unanimous Court. And we are told that the law of the land should no be ignored or defied. The declaration of the law of the land made by Justice Douglas and Chief Justice Warren and Justices Black, Frankfurter, Clark, Harlan, Brennan, Whittaker, and Stewart in the *Lassiter* case is based on legal precedents, too—legal precedents which have not yet been disturbed by any modern psychological authorities.

It is a declaration, too, written by a Justice who certainly cannot be considered as one of the strongest advocates of the freedom of the States, under the 9th and 10th amendments, to manage their own internal affairs.

Today, the law of the land as declared for scores of years, and as applied by the unanimous Court in the *Lassiter* case, is—

(1) The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent, of course, the discrimination which the Constitution condemns. *Pope v. Williams*, 193 U.S. 621, 633. *Mason v. Missouri*, 179 U.S. 328, 335.

(2) While the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U.S. 651, 663-665) it is

subject to State standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed.

(3) Among those State standards which a State may take into consideration in determining the qualifications of voters are:

(a) Residence requirements, age, previous criminal record (*Davis v. Beeson*, 133 U.S. 333, 345-347).

(b) The ability to read and write, and other literacy tests (It was said last century in Massachusetts—and I believe this is the case to which counsel called the Attorney General's attention this morning—that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage). (*Stone v. Smith*, 159 Mass. 413-414, 34 N.E. 521.)

As of June 8, 1959, 19 States of the Union had some sort of literacy requirement as a prerequisite to eligibility for voting.

These literacy tests are a reasonable regulation under which the right of suffrage may be exercised. *Franklin v. Harper*, 205 Ga. 779, 789.

This Georgia case, alluded to favorably by the Supreme Court in the *Lassiter* case, applied the law of the land as it had been declared from a time contemporaneous with the adoption of the 14th and 15th amendments in *United States v. Cruikshank*, 92 U.S. 452 (1870).

Georgia is not alone in having so held even prior to the *Lassiter* case.

I submit in my written statement just a few cases from States outside the South in which this right and freedom of the State was upheld. I marked the ones which may be of particular interest to the members of this committee, because on that list are cases from Colorado, Arkansas, Massachusetts, and from New York, among others.

Senator ERVIN. I think you have cited in this phase of your statement, cases from Idaho, Colorado, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wisconsin.

Mr. BROCH. Yes, sir.

And, in addition to those, Mr. Chairman, if any member of the committee desires to pursue the study of those cases, he may find a good start in the annotation which commences at 91 A.L.R., page 349.

It has got a copious note on all of the State court cases:

Gillesby v. Canyon County (1910), 17 Idaho 586; *People ex rel. Johnson v. Earl* (1908), 42 Colorado 238; *People ex rel. Grinnell v. Hoffman* (1886), 116 Ill. 587; *Simmons v. Byrd*, 192 Indiana 274 (1922); *Edmonds v. Banbury*, 28 Iowa 267 (1869); *State v. Butts*, 31 Kansas 537 (1884); *Anderson v. Baker*, 23 Maryland 531 (1865); *Capen v. Foster*, 12 Pick. 485 (Massachusetts, 1832); *Commonwealth v. Rogers*, 181 Massachusetts 184 (1902); *State ex rel. Pine v. Board of Education*, 158 Minnesota 459 (1924); *Ensforth v. Albin*, 46 Missouri 450 (1870); *In re Charter of Manchester*, 47 New Hampshire 277 (1867); *People ex rel. Frost v. Wilson*, 3 Hun. (New York) 437 (1875); *Fitzmaurice v. Willis*, 20 North Dakota 372; *Jeffrey v. State*, 26 Ohio C. C.

591 (1904); *Lehigh v. Thomas*, 21 Oklahoma 901 (1908); *Patterson v. Barlow*, 60 Pennsylvania 54 (1869); *In re Polling Lists*, 13 Rhode Island 729 (1881); *State ex rel. Carroll v. Superior Courts*, 113 Washington 54 (1920); *State ex rel. O'Neill v. Trask*, 135 Wisconsin 333 (1908).

If any lawyer desires to pursue the study of these State cases, he may find a good start in the annotation which commences 91 A.L.R. 349.

The Supreme Court in this *Lassiter* case recognized that Congress acting pursuant to its constitutional powers may impose restrictions to the imposition by the State of standards and tests.

What these bills propose is that Congress act above and beyond its constitutional powers.

What these bills propose is that Congress ignore the fact and the law that it has no power in this respect beyond that delegated to it by the States under article I, section 4, clause 1 of the Constitution. The full extent of the power delegated to Congress by the States is:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time make or alter such regulations * * *

Contrasted with that sole delegated power are these constitutional powers of the States of the Union:

1. That declared in article I, section 2, paragraph 1:

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the Electors in each state shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2. That declared in article II, section 1, paragraph 2:

Each State shall appoint in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress but no Senator or Representative, or Person holding an office of Trust or Profit under the United States shall be an Elector.

3. That declared in the 17th amendment to the Constitution—and, to my mind, that is one of the most important phases of this discussion, because the 17th amendment postdates the 14th and 15th. It might be ingeniously argued that the 14th amendment, that cuts into those provisions of the original Constitution which I have read, supersedes them in some respects, but that argument is absolutely nullified when we take into consideration the fact that the 17th amendment, which was adopted some half century after the adoption of the 14th provides:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years; and each Senator shall have one vote.

Now, before I read the second sentence of the 17th amendment, I will go back and read that first sentence again:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof * * *

What people? What people elect the Senators of the United States? That question is answered by the second sentence of the 17th amendment. The people who elect the Senators of the United States are:

The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Electors who have a sixth-grade education? Electors who have the qualifications prescribed by Congress? Electors who have the qualifications prescribed by the President of the United States?

Not at all.

I have not seen that referred to in anything that I have read in the discussions of these bills before the committee. Certainly it was not referred to in discussion this morning. But there clearly is a definition of what is meant by the people who elect the Senators and their representatives, those people who have the qualifications requisite for the electors of the most numerous branch of the State legislatures.

If Congress has the right to do this—

Senator ERVIN. You will pardon an interruption.

I would say that, which you have just said, is the finest and the simplest and the most indisputable statement to show the total unconstitutionality of these bills.

Mr. BLOCH. Thank you, sir. It was to me, particularly when you take this into consideration as a corollary to it.

If Congress has the right to say that the only educational standard that a State can apply is a sixth-grade education, that that is the maximum, then why cannot Congress say:

Well, now, we know that back at the time of the adoption of the Constitution, 21 years of age was the legal age of voting. But, as they said in the famous school segregation case, Brown against the People and so forth—

I paraphrase—

In this day and time education is one of the chief dominions of the State.

Now, sitting up here in Washington, we know that 21 years is no longer a real test. People see moving pictures; they hear radio; they see television. In this day and time a 10-year-old child is equivalent to a 21-year-old individual 100 years ago, so we are going to let 10-year-old children vote.

Senator ERVIN. If I may interject at this point, I have had difficulty understanding the psychological state of those who try to attribute to these simple and clear words a meaning different from what they say.

In other words, section 2 of article I and the 17th amendment say, in as plain language as can be found, that the only people who are qualified to vote for Senators and Representatives in Congress are those persons in each State who have the qualifications requisite for electors of the most numerous branch of the State legislatures.

It seems to me that speaks so plainly that there is no reason for confusion, and I have tried to get some kind of an explanation for the psychological state of those who try to attribute to those words a meaning wholly incompatible with the words themselves. I have reached the conclusion that they are in many cases sincere men who have engaged in performing what may be called an intellectual twist.

I think that fundamentally they are engaged in an effort to complicate simplicity, and whoever engages in an effort to complicate simplicity winds up in the most confused mental state possible, and I think that is the psychological explanation of these men who assert that section 2 of article I and the 17th amendment do not mean what they say in the plainest imaginable English.

Mr. BLOCH. I am coming back to the 17th amendment, if we have time, a little later.

The fourth one of the places I thought in the Constitution that was apt was the 10th amendment, of course.

(4) Those specifically reserved by the States by the 10th amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Almost fourscore years ago the Supreme Court of the United States said that the States define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State, and that the Constitution thus adopts the qualifications thus furnished as the qualification of its own electors for Members of Congress (*Ex parte Yarbrough*, 110 U.S. 663 (1884)).

If Congress has power to say that a State's educational standards of voting may be limited as provided in these bills, then it has the power to say that only holders of college degrees may vote.

If Congress has power to prescribe the educational standard prescribed in these bills, it has the power to prescribe age standards, and may substitute for 21 or 18 years of age, 40, 50, 60, or any higher or lower figure it desires.

If Congress has the power to prescribe this educational standard, it has the power to prescribe standards of required residence, and may say that no elector shall vote for a Member of Congress who has not resided in the State for 10, 20, or 30 years.

If Congress has the power to prescribe this educational standard, the people of the States will have lost their power to determine the qualifications of those who choose their Representatives.

This committee, this Senate, should place the Constitution of the United States as a roadblock to any further cutting of corners, taking of short cuts.

If any good purpose is to be served by the adoption of any such legislation as this, let it be placed before the States and the people thereof in the manner prescribed in the Constitution for amending the Constitution.

Mr. Chairman, that was my original statement. Since I prepared it some weeks ago—I remember I came up 2 or 3 weeks ago—

Senator ERVIN. When the power of the committee to hold sessions was canceled, owing to the fact that the Senate was in session and we could not obtain unanimous consent to hear you.

Mr. BLOCH. I was rather glad of it because it gave me a chance to study some more while I was up here, and I prepared a supplemental statement which has been furnished to counsel.

In my original statement, in listing the powers delegated by the States to the Congress which might authorize the enactment of this legislation, I did not overlook section 5 of the 14th amendment, nor section 2 of the 15th amendment. These bills, if enacted into law, would not be "appropriate legislation," in my opinion, as that term is used in these amendments.

That the States were not shorn of their power by these amendments is demonstrated by the language of the 17th amendment.

I have gone into that orally a few minutes ago. But I became interested, Mr. Chairman, Senators, while I was here, in reading the debates on the adoption of the 17th amendment. I became particularly interested in that because the Chairman and I are about the

same age, and we were, doubtless, students in college at the time the 17th amendment, what became the 17th amendment, was being debated.

And one of the favorite subjects of debates in those days down at the University of Georgia—they believe in debating; we have two literary societies there: one the Demosthenian, and the other the Phi Kappa, that date back over a century and the buildings that house them are more than 100 years old.

One of the favorite topics of debate in those old societies and in the intercollegiate debates back from 1910 to 1913 was, "Resolved, That Senators of the United States ought to be elected by the people of the States thereof," and we were made to debate both sides of it, too. They did not give you any one-sided view of it.

We were particularly interested in it down in Georgia because Senator Bacon, Senator A. O. Bacon, of Georgia, was in the U.S. Senate then, and he was an outstanding opponent of the 17th amendment.

I had the opportunity of having some research made as to the debates in the Senate on the 17th amendment, and I will be glad to furnish the committee with a schedule showing where those debates can be found in the Congressional Records of that day.

Some portions of it are so outstanding that, with the permission of the Chair, if you have time, I call attention to the debate that occurred on May 23, 1911, on the floor of the Senate, volume 47, page 1487, of the Congressional Record.

There, one debater after another, one Senator after another, called attention to the fact that when New York, Pennsylvania, Massachusetts, and Rhode Island ratified the Constitution, they did so with this preamble, and I quote:

In full confidence—
some left out—

that the Congress will not make or alter any regulation in this State respecting the times, places, and manner of holding elections for Senators and Representatives unless the legislature in this State shall fail or refuse to make laws or regulations for that purpose.

Now, notice there was not a single southern State there mentioned in that debate, although some of the southern States, and yours certainly, Mr. Chairman, and Virginia did pass similar resolutions.

New York, Pennsylvania, Massachusetts, and Rhode Island were those in that day guarding States rights.

Senator Rayner, of Maryland, volume 47, page 1487. said:

The idea of this clause was that when the States failed to act—
now, we are talking about the clause in the Constitution that the distinguished Attorney General referred to this morning—

when the States fail to act, Congress should act, but it never was intended and never was in the contemplation of the framers that the authority of Congress should supersede the regulations of the States.

And then he said:

There is no provision in the Constitution giving Congress supervisory power of the manner in which the States shall determine the matter or the regulation as to the election of electors.

Page 1488 of that same Record shows participation by Virginia and South Carolina.

The trend of the times was so well predicted in that debate that, with the permission of the Chair, I want to read into the record a brief statement from a speech made by Senator Heyburn, of Idaho, June 7, 1911, Congressional Record, volume 47, pages 1738 and 1739:

We are receiving into this country an element of people—

this is 51 years ago—

that bring no traditions incident to our country with them. They come from other countries where the participation of the people in the determination of public questions does not exist. They come to this country with the idea that it is in the nature of a socialistic government. They know nothing at all of the foundations, principles, or traditions of our Government.

It takes generations for them to become imbued with the ideas essential to the maintenance of this Government. They seek to change it from the time they land on our shore. That element that supports the revolutionary party in this country is a foreign element. As generations come, they drop out, but they are reinforced by others that are coming in.

For the last half century we have had to contend against the foreign idea or conception of our Government. We have had to contend against those who, because of their unfamiliarity with our system of government, and wandering in the field of political conjecture, without any anchorage, these conditions emphasize the necessity of standing by our written Constitution, which represented at the foundation of our Government the true opinions upon which the Government should rest, and which represent them in a larger measure today than ever before.

There is more necessity today than there ever was for a citizenship that adheres to the foundation principles of this country because of its traditions, because of the reasons for their adoption.

The Senator from Maryland says we are in an era of peaceful revolution. If this element is to grow and extend its influence upon our Government, we may find ourselves in a revolution that is not a peaceful one.

That is the end of the quotation from Senator Heyburn of Idaho, on the floor of the U.S. Senate, June 7, 1911, 51 years ago.

If it was true 51 years ago, how much stronger, how very much stronger is it today?

Then you will find in volume 47, page 1765, this. They were discussing a committee amendment, and they said:

The only effect of the proposed change in the Constitution would be to deprive Congress of the power to prescribe regulations for holding the election by direct legislation.

In other words, you will find there the legislative history of the adoption of the 17th amendment which proves emphatically that the second sentence of the 17th amendment was intended to define the word "people" in the first sentence.

Now, Senator Borah was a great Senator. He was sort of the idol of the college boys of 1911, and I have a long excerpt from what he said, but I read only a clause or two of it, a paragraph or two of it.

I quote from volume 47, pages 1889 and 1890:

Mr. President, I want, as briefly as I can now, to submit three propositions, and the well established law which sustains them.

The first proposition is that the State, alone, can determine the qualifications of the voter. The National Government has no power, aside from the proposition of preventing discrimination, to interfere with any qualification which the State fixes with reference to the voter. Whenever the State determines who shall vote at an election, if there is no element of discrimination, such as is covered by the 15th amendment, Congress cannot interfere with the action of the State. This question is so well established that I need only call attention to the authorities.

And Senator Borah cited *Pope v. Williams*, the *Yarbrough* case, *James v. Bowman*, 190 U.S. page 142, the last of which I do not think has been alluded to today.

And if Senator Borah were living today, he could say: "Well, Mr. Justice Douglas repeated what I said in 1911, repeated it in 1960 in the *Northampton County Lassiter* case."

And finally with my excerpts from those old debates is a speech of Senator Bacon of Georgia, which is intriguing to me because his grandson and great-grandson are practitioners today at the Macon Bar.

His grandson, who is his namesake, Augustus Octavius Bacon Spaks, is a lifelong friend of mine, one of the outstanding lawyers of Georgia, and I called his attention the other day to this speech which his grandfather had made in the Senate on April 23, 1912, almost exactly a half century ago, and just about 2 years before the old gentleman died.

Senator Bacon said:

Without exception, every State, the records of which have been preserved or can be found, beginning in New Hampshire and going to the extreme South, embodied in their adoption of the Constitution their demand that if the power of the Federal Government to supervise elections in the States should remain, it should only be exercised, in the language of the Convention of New York, whenever the legislatures shall neglect, refuses, or from any circumstance shall be incapable of doing so.

Now, Mr. Chairman and Senators of the committee, there is your foundation for your study. You will have opportunity to go into it far more fully than I did.

There is your foundation for your study of the meaning of the second sentence of the 17th amendment and your ability utterly to demonstrate the unconstitutionality of the pending legislation.

Senator ERVIN. If I may interrupt you, I think you have made a very significant contribution in calling the attention of the subcommittee to Senator Borah's statement. That statement was made by a Senator who was present in the Senate when the Senate drafted and submitted the 17th amendment to the States for ratification or rejection. He stated most clearly and most emphatically in the excerpt from his speech, which you have read, that the Congress has no power whatsoever to prescribe the qualifications of voters, and that, on the contrary, that power belongs solely to the State, and the only limitation then on that power was that imposed by the 15th amendment.

Of course, since that time the 19th amendment has imposed another qualification or limitation, and it is very significant that the position that Senator Borah took in 1911, when they were considering the submission of the 17th amendment, was identical with the position taken by Alexander Hamilton, who was a party to the convention in which sections 2 and 4 of article I were written.

In the letter of Hamilton which constitutes Federalist No. 60, Hamilton said that the Congress had no power whatever to prescribe the qualifications of voters, but that that power was confined to the States.

Mr. BLOCH. Shall I proceed, sir?

Senator ERVIN. Yes.

Mr. BLOCH. I am very nearly through.

What you said there couples in with what I had next here. You will notice that when Senator Borah was speaking, in what I read, he did not refer to the 14th amendment. He did not refer to the 14th amendment at all. He referred to the 15th amendment. He never referred to the 14th amendment because it is only very recently that the 14th amendment has been construed so as to have anything whatsoever to do with voting.

If the 14th amendment had been intended to apply to voting, then the 15th amendment was pure surplusage. There was not any need of it at all.

That was demonstrated just a few years after the adoption of the 14th amendment by the Supreme Court of the United States, just 4 years after the adoption of the 14th amendment.

Mrs. Virginia Minor, a native-born, free, white citizen of the United States and the State of Missouri over the age of 21 years wished to vote for electors for President and Vice President of the United States and for a Representative in Congress at the general election to be held in 1872.

She applied to one Happersett, who was the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a male citizen of the United States but a woman, and, therefore, not qualified to vote under the constitution of the State of Missouri, which provided that only male citizens should vote.

The Supreme Court of the United States upheld the registrar, being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitution and laws of the several States which commit that important trust to men alone are not void.

That decision remained as the law of the land until the adoption 40 years later or 45 years later of the 19th amendment.

I suppose it will be argued that the decision has become eroded by time, and that under more recent decisions the State may not deny to any person within its jurisdiction the equal protection of any of its laws, including registration and voting laws.

It will be argued, therefore, that qualifications prescribed by State laws for voting or registration to vote, other than qualifications based upon age, residence, freedom from confinement and freedom from conviction of a crime, are susceptible of use and have been used to deny citizens the right to vote because of their race and color, and that, therefore, Congress has the right to, and should, nullify and supersede the qualifications by State laws.

Now, that was one of the arguments that the distinguished Attorney General made this morning:

That we folks down in the South are discriminating against colored people who are applying for the vote, and, therefore, Congress has got to enact some legislation like this about it.

Now, if this be good logic, if section 5 of the 14th amendment⁺ can be used in that respect, then it can be used to abolish any State legislation which the Congress thinks is being used to deprive persons within the jurisdiction of any State of the equal protection of the laws.

It would make no difference, if this is the law, what State or how many States had used the law discriminately, or, in the language of

the Constitution, so as to deprive persons within its jurisdiction of the equal protection of the laws.

If the State of California, for example, in the opinion of Congress, used its capital punishment statute so as to deny persons within its jurisdiction of the equal protection of it, that is, if more Chinese or Negroes were executed than white people, then the Congress could supersede the statutes of all States prescribing capital punishment.

Under this new theory of constitutional law, if a State criminal statute is even susceptible of such use by any State, Congress may repeal all such statutes in every State.

This supposed new-found power of Congress would not be confined to criminal statutes. If taxing statutes of a State are susceptible of such use or are being so used by any one State, Congress may repeal them all.

Under this supposed new-found power Congress could repeal any statute of any State susceptible of being used to abridge the privileges or immunities of citizens of the United States.

Under this supposed new-found power Congress could repeal any statute of any State susceptible of being used to deprive any person of life, liberty, or property without due process of law, or susceptible of being used so as to deny to any person within the jurisdiction of a State the equal protection of the law.

If Congress has this power, then the States and the cities have absolutely no police power left, for any statute or ordinance enacted for the health, safety, and general welfare of the people is susceptible of being discriminately used, driver's licenses, speed-limit laws; all safety measures will disappear; all health measures will disappear; and the control of every phase of everyday life will pass from city councils and State legislatures to the Congress.

Senator ERVIN. At this time we will hear from Senator Goldwater, who had very kindly given his consent for you to finish your statement. Counsel may want to ask questions, but I know what diligent efforts you have made to get here at the scheduled time, and it has been very difficult.

Mr. Bloch understands thoroughly.

Mr. BLOCH. Do you want me to wait?

Senator ERVIN. Yes, if you will.

STATEMENT OF HON. BARRY GOLDWATER, U.S. SENATOR FROM THE STATE OF ARIZONA

Senator GOLDWATER. I will probably learn more listening to him than he will listening to me.

Mr. BLOCH. I doubt that.

Senator ERVIN. Senator Goldwater, do you know Mr. Bloch?

Senator GOLDWATER. How do you do, sir. Nice to know you.

Senator ERVIN. In my judgment, I do not think there is a superior constitutional lawyer in the United States. In fact, I do not think he has any equal.

Senator GOLDWATER. I will not be getting into that aspect of it.

Mr. Chairman and members of the committee, I do not intend to take long on this. My Governor called and asked if I would mind taking his place because you had requested that he be here and he cannot be here.

The Governor and I, I believe, are in perfect agreement on this.

That there are abuses, as charged by the Attorney General, I do not think we can doubt, and it is regrettable. But I do not see why we should change 44 State constitutions and State laws because six are violating the so-called constitutional rights to vote.

Neither can I understand the magic of the sixth grade test. Now, the Arizona law is a very simple one. A person has to pass two literacy tests to be eligible to cast his ballot.

First, he must be able to read the U.S. Constitution in English. This means just usually the first sentence.

Second, he must be able to write his name.

I cannot think of a better literacy test than being able to read a sentence or two of the Constitution and write one's name. We go a little further out there. In the Constitution we add a requirement for State officers and members of the legislature. In fact, I believe this goes all the way down to highway patrolmen, employees of government.

These officeholders must be able to read, write, speak, and understand the English language.

I just mention that to show that we require it in other places than to voters.

Now, I cannot see in a situation like this why people believe that changing the law will change the nature of man. If men in the South or any place else are determined that other men are not going to vote, I suggest that any law we write can be gotten around.

Frankly, I cannot imagine anything easier to get around than a sixth-grade certificate.

For example, let us say that a man moves into the South, a Negro, and he comes from a Northern State or a Far Western State, and he goes down to register, and the registrar says:

"Did you go through the sixth grade?"

"Yes."

"Do you have a certificate?"

"No."

"Well, let us get a certificate first."

And I think we would agree some evidence has to be provided. We could not just take a person's word that he had been through the sixth grade when we do not have the law to require him to read and write.

I can imagine a registrar who is determined not to allow a person to vote going through all kinds of shenanigans about this sixth-grade certificate.

There could be specifications that he would have to follow, and these specifications would not be met.

You would have the problem put to the individual man who says:

"I passed the sixth grade but it has been 15 or 20 years ago, and I doubt that I can get a certificate, but let me read a little bit to you and let me write for you, and that will certainly indicate my ability to understand and transmit the English language."

So I believe what we are creating here, if this is passed, is really a better way for those southerners and others who want to deny the Negro the voting right to deny this.

I firmly believe that these 44 States which have had good success with this test can testify to the fact that they have never had trouble with it; that if a registrar does deny, when proof can be made of the ability to pass the literacy test, then there is a place to go far for it, and that is in court. In fact, as I was listening this morning to the Attorney General testify—mind you, I am not a lawyer—I kept wondering why he does not have the power under the Constitution to apply the 14th and 15th amendments in a case there is any validity to them.

Mr. Chairman, in Arizona we have a very unusual interest in this that goes past what I have been talking about.

(At this point in the proceedings, Senator Keating enters the hearing room.)

Senator GOLDWATER. We have the largest Indian population in the United States, native Indians. At the last census, we had a total of about roughly 70,000 Indians out of a population of 1,300,000.

Now, when our enabling act was passed, we were required by the Federal Government to accept a provision that prevented Indians from voting, and I might say, while it has no connection, prevented them from buying liquor.

In 1948 they were given the right of franchise, and where they can pass the literacy test, they vote.

I would say—and this is just a rough guess, because it is very difficult to break this voting down—out of a total of 70,000 Indians in Arizona, probably fewer than 10,000 of them can pass a literacy test.

Now, this is improving every year.

We have 25,000 Navajo children alone in school where 10 years ago we had only 2,500.

The war improved the literacy of these people, so, I think within a matter of, oh, the next 20 years, the great majority of these Indians will be qualified to vote.

But here would be an example of a citizen of the United States of adult age who could not say they have been through the sixth grade because they have never been to school. So what would the Attorney General suggest to take care of these people? I am firmly opposed to anyone having the right to vote who cannot understand the English language and transmit his thoughts in it. I think we would be loosing a Pandora's box if we said anybody can vote, regardless of their qualifications.

Voting is a privilege; it is a right; but it carries responsibility; and I would hate to see officials being elected by the votes of people who did not even know the names of the candidates.

Senator ERVIN. If my recollection serves me right, the statute about the naturalization of aliens provides that a man cannot become a naturalized American citizen until he learns to read and write the English language.

Senator GOLDWATER. The Senator is correct on that. I was waiting for him to bring that out this morning in his colloquy with the Attorney General.

Now, the Indian problem in Arizona relative to voting will take care of itself, given time.

We want them to vote.

We are anxious for them to vote.

But, to give you another example of the difficulties that we have with the largest tribe, which is the Navajos, and we have 42,000 of them, these are a seminomadic people. They wander around.

We tried for years to get them to come in to register. But they are not going to drive their wagons or ride their horses 75 miles to 100 miles just to do this.

We have tried all manner of things to get them to do it, such things as holding barbecues. They will ride a long way for a free piece of beef and some beans. But when we get them in, they are not overly interesting in voting.

However, that is changing, and I believe will change more rapidly in the coming years.

Now, in the bill, S. 2750, there is an expression of concern—I am referring now on page 2, subsection (e) :

The Congress further finds that large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used. That these citizens are well qualified to exercise the franchise. That such information as is necessary for the intelligent exercise of the franchise is available through Spanish language news sources. That lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic processes.

Now, Senator, whoever prepared this bill just does not understand the facts of life. I would daresay that in most sections of the Southwest where we have people of Mexican ancestry, that they are more diligent in their voting than are we Anglos. We find in the so-called sections of the communities where these people live that they are better organized, better registered. There are very few areas in the Southwest anymore where only Spanish is spoken, and you have to look hard to find those.

In my State, for example, occasionally I will make a campaign speech in Spanish, and I do it because the old people like to hear my mistakes. The youngsters do not understand a word of Spanish. So this is no problem.

Senator ERVIN. Whoever drew that recitation certainly finds himself differing with the members of the legislatures of about 21 States, which have declared that literacy tests shall be given on the basis of proficiency in the English language.

Senator GOLDWATER. That is correct. I do not argue with his thesis. If this were true, then I think his approach would be a correct one; that we do have Spanish newspapers, Spanish-written newspapers, and Spanish-speaking radio programs from which they could learn these facts.

But they also have children who can tell them, where you find a few families left that speak only in Spanish.

It is very rare to find this anymore.

I just wanted to mention that because I do not agree that this is a serious threat to voting rights in this country.

Now, I have a question that I wanted to ask, and I have not heard it come up yet.

Under 2750, which is a bill "to protect the right to vote in Federal elections free from arbitrary discrimination by literacy test or other

means," if this legislation passes, are we not allowing the States to set up a double standard?

Would not, for example, my State, following this law, require that anybody who wants to vote for a Federal officer display a sixth-grade certificate?

When we passed voting on the President, the Senators and the Representatives, would it not be possible to then go back to our own State law for a literacy test to be applied in State elections?

Senator ERVIN. Yes; that is undoubtedly true.

In other words, that is the reason I think that those who back this bill ought to be consistent.

They recognize that the Federal Government cannot prescribe any qualifications for voters under article I, and the 17th amendment, because section 2 of article I and the 17th amendment expressly give that power to the State government in congressional elections.

So, in trying to bolster a bill, which would be unconstitutional on that ground, they resort to the 15th amendment.

Now, under the decisions, the only limitation placed by the 15th amendment on the powers of States under section 2 of article I of the 17th amendment is that they cannot deny or abridge a citizen's right to vote on the basis of his race, color, or previous condition of servitude. They want to tie this bill onto the 15th amendment, but if this bill is valid under the 15th amendment, then it is just as valid in State elections as it would be in elections of Senators and Representatives in Congress, in my judgment.

Senator GOLDWATER. Am I not correct, too, in assuming that a man has the legal right to vote because he is a citizen of a State, not a citizen of the United States?

Senator ERVIN. That is right; as pointed out a moment ago by Mr. Bloch. In reading the first clause of the 17th amendment, it says that these States shall have two Senators, to be elected by the people thereof, and then in the second clause it says who the people are.

It says the electors for Senators shall have the qualifications of electors of the most numerous branch of the State legislature, and the Supreme Court of the United States has declared in the *Yarborough* case and a number of other cases that the Constitution itself specifies that the people who are to vote for Senators and for Representatives in Congress shall be those people whom the State law has declared eligible to vote for the most numerous branch of the State legislature.

Senator KEATING. Mr. Chairman, may I interrupt for a comment at this point.

Senator GOLDWATER. Before you do, would you allow me to ask that these tables of Indian population be printed at this point before we get into another colloquy?

Senator ERVIN. Yes. They will be included in the record at this point.

(The tables referred to are as follows:)

DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS,
Washington, November 30, 1960.

I hereby certify, that according to the official count of the returns of the Eighteenth Census of the United States, on file in the Bureau of the Census, the total and the Indian population of the designated counties in the State of Arizona, as of April 1, 1960, was as given below:

County	Total population	Indian population	County	Total population	Indian population
Apache.....	30,438	22,814	Mohave.....	7,736	727
Cochise.....	55,039	108	Navajo.....	37,994	19,324
Coconino.....	41,857	11,668	Pinal.....	62,673	5,760
Gila.....	25,745	3,513	Santa Cruz.....	10,808	17
Graham.....	14,045	1,249	Yavapai.....	28,912	780
Greenlee.....	11,509	182	Yuma.....	46,235	1,802

ROBERT W. BURGESS,
Director, Bureau of the Census.

Indians living on Arizona reservations, Apr. 1, 1960

[Estimates from superintendents]

Reservation	Living within reservation	Living adjacent to reservation ¹	Counties in which reservation is located
Total.....	67,657	1,688	(Total Indians, 69,345.)
Navajo (Arizona only).....	41,235	78	Apache, Navajo, and Coconino.
Big Sandy (Truxton Canyon).....	12		Mohave.
Camp Verde.....	170	36	Yavapai.
Cocopai.....	80	4	Yuma.
Colorado River.....	1,368	63	Do.
Fort Yuma (Arizona only).....		24	Do.
Havasupai.....	188		Coconino.
Hualapai.....	410		Coconino, Mohave and Yavapai.
Yavapai.....	54		Yavapai.
Fort Mohave.....			Mohave.
Fort Apache.....	3,864	183	Apache, Navajo, and Gila.
Hopi.....	4,123	880	Navajo.
Kaibab.....	90	40	Mohave and Coconino.
Gila Bend.....	10	150	Maricopa.
Papago.....	4,200		Pima, Pinal, and Maricopa.
San Xavier.....	400		Pima.
Ak Chin (Maricopa).....	140	15	Pinal.
Fort McDowell.....	300	15	Maricopa.
Gila River.....	6,000	125	Maricopa and Pinal.
Salt River.....	1,500	75	Maricopa.
San Carlos.....	3,515		Gila, Graham, and Pinal.

¹ Indians living adjacent to reservation, who are regarded as reservation residents because they have interests on the reservation or frequently move on and off the reservation.

SENATOR KEATING. Mr. Chairman, the witness has raised a point similar to the one which I raised this morning, in directing some inquiries to the Attorney General.

There is no difference in the constitutionality of establishing an objective test of literacy in Federal elections or State elections, if you base it upon the 14th and 15th amendments, if you have a showing that there has been a deprivation of the right to vote because of race, color, and previous condition of servitude. That applies clearly under the Constitution just as much to a State election as to a Federal.

The Attorney General indicated that he felt that the constitutionality was more doubtful if you included State elections. I see no dif-

ference whatever. The Constitution speaks expressly of the State as well as the Federal Government.

The bill which I have offered, S. 2979, for myself and 14 other Senators, applies to both Federal and State elections.

I raised the practical question, which would be presented in States in which all the candidates are on one ballot or one voting machine. If this bill were enacted in its present form and did not apply to State elections also, it would require many of these States to enact new legislation providing separate ballots for their Federal and their State offices.

Senator GOLDWATER. Speaking strictly as a layman, I believe there is a constitutional argument against telling the States what their requirements would be in State elections. I do not think there is any argument about it, myself, as far as Federal elections go. Today, in Federal elections, we can ask for the surveillance of the polling place by marshals or by the FBI where Federal elections are involved.

Senator KEATING. Well, the Constitution does not permit the determination by the Federal Government of the qualifications of voters in either Federal or State elections. There is no such line of distinction drawn in the Federal Constitution.

There may be a question of policy, but the Constitution makes no distinction between the election of Federal or State officers if there is a factual showing of discrimination on the grounds of race, color, or previous condition of servitude.

Senator GOLDWATER. But I believe that is one of the major points on which constitutional lawyers will argue.

Senator ERVIN. I do not believe we are in disagreement.

Senator KEATING. The chairman and I are not in disagreement on that point.

Senator ERVIN. In other words, the Congress does have certain power with respect to the elections of Senators and Representatives in Congress, but it is not a power to prescribe qualifications for voters. The Constitution says that any person who is qualified to vote for electors in the most numerous branch of the State legislature in the particular State has a right to vote for Senators and Representatives in Congress in that State.

The difference between the Federal power then and that in the State elections generally is this: There is a provision in section 4 of article I which says it gives Congress the paramount power to regulate the times, the places, and the manner of holding elections for Senators and Congressmen. But that only extends to dealing with mode of elections—that is, the casting of votes and the counting of votes and the certifying of returns of the election. In other words, it is the mode and manner in which the voter is qualified by the State law to vote for the most numerous electors of the State legislature that the Congress does have the power to deal with the method and manner in which that is done. There is no difference between State and Federal elections as to qualifications, because the qualifications have to be those set out in section 2 of article I.

Now, the point that Senator Keating is making, and I agree with him in this, if this bill can be sustained as a valid enactment on the basis of the 14th and 15 amendments as to the election of Senators and Congressmen, then by the same token it can be sustained as a valid enactment as to all elections.

I say it cannot be sustained under any section. In the first place, it cannot be sustained under the original Constitution, because the original Constitution by section 2, article I says that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Now, this bill cannot be sustained, in my judgment, under the 14th and 15th amendments, for two reasons:

In the first place, the bill is not predicated upon a violation of any amendment in any State. In the second place, the bill does not correct a violation of those amendments, because it does not attempt to punish the States for violation, but it allows Federal Government to erect a Federal standard to supersede the State standards.

Senator GOLDWATER. That is the point that both my Governor and I agree on, that this is true, plus our argument that these 44 States, of which we are one, have never had any trouble in this area.

We would resist it; we do not condone it; we do not like the fact that it is practiced in some of these States, but we feel that no law you can pass can stop a man who is determined to deny another man his rights.

As I said earlier, requiring a certificate of graduation from the sixth grade can be gotten around more easily than anything that I have seen.

In our own State, we repeat the language of the Constitution in our own constitution:

The States shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.

So I do not think, Mr. Chairman, in closing my testimony—

Senator KEATING. Before you close, Senator, I wanted to compliment you. You almost brought the chairman and the Senator from New York together and they have agreed on something here. The only point is, they agree on the constitutional question and then land exactly at opposite poles on what the result of that is.

But you are a catalyst, a real catalyst, to bring the two of us together on a constitutional question.

Senator GOLDWATER. I would say that it would not take any great catalyst to bring two such delightful ingredients together into a harmonious one.

Senator ERVIN. We agree on what the constitutional foundation is, but we disagree as to the proper interpretation of that foundation.

Senator GOLDWATER. If we could just mix now into this cake batter a little respect for the States that have successfully operated under the intent of the Constitution and not disturb our laws and Constitution by a change that we do not feel we need, and I will be perfectly honest with you, Senator Keating, with all respect for your feelings on this, that you are making it easier to deny the Negro the right to vote by providing this sixth-grade provision than the registrars find it today.

I can think quickly of dozens of ways to get around this and I think the courts would go crazy trying to prove you are wrong.

Senator KEATING. Well, I disagree with that, of course. The use of literacy tests to deprive the Negro of the right to vote, according to the evidence before the Civil Rights Commission, was one of the most effective, if not the most effective, device used.

There are many other devices used and the Attorney General is just hitting a small part of the problem by this narrow bill. But it is part of it and I think if a sixth-grade certificate were made the objective test of literacy it would be a step—not a long step, but a step along the road toward assuring the right to vote and would be an additional impediment to those who are determined to deny the right to vote.

Senator GOLDWATER. Might I present two hypothetical cases that could arise under this? One would be openly dishonest, but we have found some dishonest things going on in our elections for a long time, probably will for a long time yet.

Let us suppose that we have a papermill turning out certificates for sixth-grade graduates and we present these to just anybody—we do not care whether they can read or write or even speak the language and they present this to a registrar any place in the United States.

Under the law, he would be required to issue that person the right to vote by register.

Senator KEATING. He would have the right to determine whether this was a valid certificate.

Senator GOLDWATER. That is a question in my mind. Will he be allowed to do that, because as I understand these bills, the prima facie evidence of literacy is a sixth-grade diploma or certificate.

Senator KEATING. That is right, but a certificate certainly could be rejected on the ground that it was a forgery or invalid.

Senator GOLDWATER. Well, you have tens of thousands of sixth-grade schoolrooms in this country. I cannot imagine a registrar in a small county in the South being able to say with authority that it was a camouflage.

But let us take another look at this, now. Let us go around the other way. Let us say the registrar does say, "Well, I do not believe you got this certificate in the right way," and the man says, "Well, let us prove it to you. I will read anything you have and I will write anything you want me to write."

He says, "Oh, no; that won't be of any value, because I have to have proof that this certificate is a valid one."

Even if he comes with a valid one, the registrar with an intent to deny anybody the right to vote can pull this same gag. It has been used in Arizona; it has been pulled in parts of this country. It does not happen any more, but I can remember when people from the East would come into our district to register and they wanted to register Republican and the registrar would look at him with a straight face and say, "We don't register Republicans here."

Now, there may be another way, but I know of no better way to determine a person's literacy than to ask him to read and write. But I am very fearful that under your bill, the bill of the majority and minority leader, you are going to find more abuse because you are opening up new avenues.

Senator ERVIN. Now, I have departed from the Senator from New York and joined the Senator from Arizona. I cannot imagine a finer way to assist any registrar who wants to deny a qualified nonwhite the right to register to vote than this bill. He could say to him in the first place, "I am not allowed to give you any literacy test. I cannot ascertain whether you can read or write. Have you completed the sixth grade in school?"

If the voter answers in the affirmative, the registrar can say, "Well, I can't register you; I can't test you unless I find out first whether you are telling me the truth about this, that you completed the sixth grade in school. I therefore call upon you for legal proof of the fact that you have completed the sixth grade in school."

Now, if the registrar wanted to, he could demand legal proof, which could require the production of a certificate signed by the proper authorities. If the proper authorities could not be found or his record could not be found for them to certify, why, then, he could not register; he could not give him a test because he claimed he had a sixth-grade education. He could not tell whether the registrant could read or write and could meet the literacy requirement.

Or if the fellow came from out of State, he would be required to register him under the statute. I do not remember what the terms are, but in the courts when you want to certify a clerk, you have to certify the judge as a judge and you get the judge to certify the clerk as a clerk and you have that plastered all over with great big seals.

Now, if the man says, "No, I have not completed the sixth grade," he can say, "You will have to prove it to me because this law forbids me to give you a literacy test if you have. I would have to violate the act of Congress to give you a literacy test. The act says I can't do it. You have to prove to me that you have completed the sixth grade of some school before I am allowed by the law to give you a literacy test to prove you are literate."

I cannot think of anything more calculated to keep a registrar from registering a man—

Senator KEATING. All I can say, Mr. Chairman, is that if this is such an ineffective bill there should not be strong opposition to it from any quarter.

Senator ERVIN. I do not come from an area where the test is used to keep anyone who is qualified from voting.

Senator KEATING. That is my understanding and should be said in all fairness.

Senator ERVIN. I have grandchildren, and I think the greatest device ever conceived by the minds of men is the Constitution of the United States. I am going to do all I can despite all political pressures and despite all the sob sisters to try to see that this Constitution is handed down to my grandchildren in as good shape as it was when I came into this world.

I am going to stand for the Constitution for that reason solely. I agree with the Senator from Arizona, I do not think any qualified citizen of any State ought to be denied the right to vote anywhere.

But I think in enforcing the voting laws, we should go to the courts and enforce them as we enforce any other law. And we have more laws on this subject than any other I can think of right now.

Mr. BLOCH. Mr. Chairman, I have to catch a train. I wanted to be excused. Senator Goldwater said something that made me think of something that I had forgotten in my prepared notes. I am glad Senator Keating is here. He was not here when I was testifying.

Senator KEATING. We have sat across the table from each other for a great many years.

Mr. BLOCH. I made the statement, Senator, during my prepared talk, that the 14th amendment did not have a blessed thing to do with voting and I forgot to prove it.

Senator Goldwater said something in his discussion that helped me prove it.

The 14th amendment says:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Now, you see the word "citizen" there; of "citizens of the United States."

The case to which I called attention during our discussion of *Minor v. Happersett*, where the Supreme Court of the United States held that a white woman could not vote despite that privilege or immunity section, and despite the fact that she was a citizen, because the privilege of voting was not a privilege or immunity of a citizen of the United States but a privilege or immunity of a State. That is the only place where the word "citizen" is mentioned in the 14th amendment.

Senator KEATING. Is not a citizen of a State a citizen of the United States?

Mr. BLOCH. Yes; but the privilege of voting comes not from the United States but from the State.

Look at the next clause, "Nor shall any State deprive any person of life, liberty, or property without due process of law."

It does not say "citizen"; it says "person," "nor deny to any person within its jurisdiction the equal protection of laws."

Now, if the equal-protection clause applies to voting, then the State cannot deprive any person within its jurisdiction, whether he be a citizen or not, of the right to vote.

Senator KEATING. Could I ask you this question: Could a State deprive every baldheaded person of the right to vote? Would that be a violation of the 14th amendment?

Mr. BLOCH. If a person is denied the right of voting by reason of his race, color or previous condition of servitude—

Senator KEATING. I am talking about a baldheaded person. Would it be a denial of the equal protection of the laws, for a State to pass a law saying no baldheaded man could vote?

Mr. BLOCH. It would be a denial of the equal protection of the laws, yes; but it would not be depriving him of a constitutional right.

Senator KEATING. Equal protection of the laws is a constitutional right.

Mr. BLOCH. The Federal Government has nothing to do with voting except in situations where the 15th amendment or the 19th amendment apply.

Senator ERVIN. You have raised a very interesting point, because the truth of it is in the original decisions under the 14th amendment, the Court held that the 14th amendment recognized the rights of the States to disenfranchise some of their citizens.

In other words, as far as voting is concerned, the second section of the 14th amendment provides that a State which denies to a substan-

tial number of its male citizens of the age of 21 years the right to vote may have its representation in Congress decreased proportionately.

It is very interesting. Here is the case of *Stone v. Smith*, which was decided by the Supreme Judicial Court of Massachusetts and is reported in 159 Mass. 414, and 34 N.E. 521, which discusses the second section of the 14th amendment.

It says:

This section distinctly recognizes the right of a State to deny or abridge the right to vote of the male inhabitants who are 21 years of age, and it is well known that many of the States have from time to time by an impartial and uniform rule of prohibition denied the right to vote of such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right.

That is very interesting, since it comes from the State of Massachusetts rather than from Georgia or North Carolina or Alabama. So, the 14th amendment, according to the Supreme Judicial Court of Massachusetts, expressly recognizes the right of the State to deprive some of its citizens of the right to vote.

Mr. BLOCH. Mr. Chairman, I would like the privilege of supplementing—

Senator ERVIN. That was cited and approved by the Supreme Court of the United States in the *Lassiter* case in 1959.

Mr. BLOCH. May I be excused?

Senator ERVIN. Yes, sir.

Mr. BLOCH. I would like to have the privilege of supplementing my statement by something on that which I was reminded of by Senator Goldwater.

Senator ERVIN. I hope you can get it within the next few days.

Senator KEATING. The Tuesday after Easter is the date for the so-called literacy bill to be called up on the floor. I assume the proper way to do that is through this committee, so the quicker you get your information in to us the better we will be able to act on it. It seems like the orderly way to present the matter to our colleagues in the Senate.

Mr. BLOCH. You will have it by Monday.

Senator GOLDWATER. I just want to thank you, Senator Ervin and Senator Keating, for allowing me to be here. I want to make it clear that I am not in favor of the actions practiced in certain parts of our country. I do not think anybody should be denied the right to vote because of race, creed, or color, but neither do I believe that this bill will solve the problem.

I think it will only compound the difficulties, and I am hopeful that in your discussions, during the period of time when you write the bill up, you can direct your efforts toward some solution that will recognize that 44 out of the 50 States have never had any trouble, doing it the way we are doing it, by requiring a simple literacy test.

Senator ERVIN. I would like to say I agree with both of those observations. I think any man qualified to vote should be allowed to vote anywhere, in the precinct in which he resides.

But as I read these preambles in this bill, they remind me of the opening verses of the second chapter of Genesis.

As I remember, the serpent tempted Eve to eat of the tree in the midst of the Garden of Eden, the tree of forbidden fruit.

The serpent told Eve, "Now, can you eat of any tree in the garden?" Eve said, "No. I can eat of any tree except the fruit of the tree in the midst of the garden. I cannot eat of that. The Lord has forbidden us to eat of that."

The serpent said to Eve: "Well, the fruit of that tree is pretty and if you eat it, it will make you wise, make you know things, increase your knowledge."

So Eve looked at it and noticed the fruit of the tree was pleasing to the eye and it looked like it would be good to taste, and it was something she was desirous of consuming because the person who consumed it would become wise. So Eve succumbed to temptation and ate of the tree in the midst of the garden.

That is exactly what the preamble of this bill reminds me of—Eve. Because the advocates of the bill set out there something about the fruit of the tree being pretty and like Eve, they are succumbing to temptation. They say, "We are going to do some constitutional evil in the hope that some good will flow from it."

And that is the reason why I think the preambles to this bill remind me of Eve and the serpent.

We want to thank you, Senator Goldwater.

The subcommittee is very deeply grateful to both Senator Goldwater and Mr. Bloch for appearing before us and giving us the benefit of their views with respect to this legislation.

If there is nothing further, we will take a recess until 2 p.m. tomorrow.

(Whereupon, at 4 p.m., the hearing recessed, to resume Wednesday, April 11, at 2 p.m.)

SUPPLEMENT TO STATEMENT OF CHARLES J. BLOCH ON LITERACY QUALIFICATION
BILLS S. 480 AND S. 2750

In my original statement, in listing the powers delegated by the States to the Congress which might authorize the enactment of this legislation, I did not overlook section 5 of the 14th amendment, nor section 2 of the 15th amendment.

These bills, if enacted into law, would not be "appropriate legislation" as that term is used in these amendments. That the States were not shorn of their powers by these amendments is demonstrated by the language of the 17th amendment.

Section 5 of the 14th amendment is one of the vehicles by which the Senate is asked to enact S. 2070, the Federal Voting Rights Act of 1962.

Just 4 years after the adoption of the 14th amendment, Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, over the age of 21 years, wishing to vote for electors for President and Vice President of the United States, and for a Representative in Congress at the general election held in November 1872, applied to one Happersett, the registrar of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a male citizen of the United States, but a woman, and therefore not qualified to vote under the constitution of the State of Missouri, which provided: "Every male citizen of the United States shall be entitled to vote." The Supreme Court of the United States upheld the registrar, "being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void" (*Minor v. Happersett*, 21 Wall. 162, 178).

That decision remained as the "law of the land" until the adoption, 45 years or so later, of the 19th amendment.

I suppose it will be argued that that decision has become eroded by time, and that under more recent decisions a State may not deny to any person within its jurisdiction the equal protection of any of its laws, including registration and voting laws.

It will be argued, therefore, that qualifications prescribed by State laws for voting, or registration to vote, other than qualifications based upon age, residence, freedom from confinement, and freedom from conviction of a crime, are susceptible of use, and have been used, to deny citizens the right to vote, because of their race and color, and that, therefore, Congress has the right to and should nullify and supersede the qualifications prescribed by State laws.

If this be good logic, if section 5 of the 14th amendment can be used in this respect, then it can be so used to abolish any State legislation which the Congress thinks is being used to deprive persons within the jurisdiction of any State of the equal protection of the laws.

It would make no difference—if this is the law—what State, or how many States, had used a law "discriminatingly," or in the language of the Constitution, "so as to deprive persons within its jurisdiction of the equal protection of the laws."

If the State of California, for example, in the opinion of Congress used its capital punishment statute so as to deny persons within its jurisdiction the equal protection of it, that is, if more Chinese or Negroes were executed than white people, then the Congress could supersede the statutes of all States prescribing capital punishment.

Under this new theory of constitutional law, if a State criminal statute is even susceptible of such use by any State, Congress may repeal all such statutes in every State.

This supposed new-found power of Congress would not be confined to criminal statutes.

If taxing statutes of a State are susceptible of such use, or are being so used by any one State, Congress may repeal them all.

Under this supposed new-found power, Congress could repeal any statute of any State susceptible of being used to abridge the privileges or immunities of citizens of the United States.

Under this supposed new-found power, Congress could repeal any statute of any State susceptible of being used to deprive any person of life, liberty, or property, without due process of law, or susceptible of being used so as to deny to any person within the jurisdiction of a State the equal protection of the laws.

If Congress has this power, then the States and the cities have absolutely no police power left, for any statute or ordinance enacted for the health, safety, and general welfare of the people is susceptible of being discriminately used.

Drivers' licenses, speed limit laws, all safety measures, will disappear.

All health measures will disappear.

Control of every phase of every day life will pass from city councils and State legislatures to the Congress.

SUPPLEMENT TO TESTIMONY OF CHARLES J. BLOCH

During the hearing of April 10, I was granted permission to supplement my remarks with additional material. I had hoped to make a fairly complete statement with respect to the 14th amendment and voting rights. However, I am now advised that supplementary material must be furnished by April 16. Hence, this will of necessity be rather sketchy.

I had hoped to develop the thesis that the 14th amendment was not intended to apply to voting rights.

If it was so intended, the adoption of the 15th was useless.

I am not unmindful of the trend of recent cases, but my knowledge of their holdings does not prevent my wondering when the shift from the 15th to the 14th as the measure of voting rights commenced and why.

The very fine opinion of Circuit Judge Cameron writing for himself and District Judges Mize and Clayton in *Darby v. Daniel*, 168 F. Supp. 170, in holding that "the qualification of voters is a matter committed exclusively to the States" and that "the Supreme Court has spoken on the subject in language as clear as it is decisive" (p. 176) cites several Supreme Court decisions beginning with *Pope v. Williams* (1904), 193 U.S. 621.

Then, Pope contended that the assailed Maryland statute was contrary to parts of the 14th amendment including that which prohibits a State from denying any person within its jurisdiction the equal protection of the laws.

The Court reiterated its ruling in *Minor v. Happersett*, 21 Wall. 162, and said:

"The State might provide that persons of foreign birth could vote without being naturalized, and as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, *supra*, such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the State alone to prescribe, subject to the conditions of the Federal Constitution already stated; * * * (pp. 632-633).

I emphasize certain words because it was those which I had in mind when I responded to the query of Senator Keating during the hearing.

The "conditions of the Federal Constitution" to which the Court referred are those of the 15th amendment (op. cit. 632) as the 14th does not in section 1 mention "race, color, or previous condition of servitude."

The next one cited is *Guinn v. United States*, 238 U.S. 347, which has doubtless been often cited in these hearings.

There the Court held a clause of the Oklahoma constitution to be void because it violated the 15th amendment. In the headnotes in the official report, the 15th amendment is mentioned five times; the 14th not once.

Indeed, in the arguments for the plaintiffs in error (p. 349) is this paragraph:

"Suffrage in the States of the American Union is not controlled or affected by the 14th amendment to the Constitution of the United States. Blaine's Twenty Years in Congress; Brannon's 14th amendment, 77; *Coffield v. Coryell*, 4 Wash. O.C. 371; Miller's Lectures on Const. 661; *Minor v. Happersett*, 21 Wall. 162; *Slaughter House Cases*, 16 Wall. 36; *Strauder v. West Virginia*, 100 U.S. 303; 1 Willoughby's Constitution, 534; 2 Id. 483; 5 Woodrow Wilson's Hist. Am. People."

The argument of Mr. Solicitor General Davis for the United States as summarized (pp. 350-353) does not mention the 14th amendment, nor does the Court in its opinion.

Yick Wo, next mentioned, did not deal with voting rights.

Lane v. Wilson, 307 U.S. 268, dealt with an act of the Oklahoma Legislature passed following the *Guinn* decision. Justice Frankfurter delivered the opinion of the Court (of which Justices Black and Douglas were members) but Douglas took no part in the consideration of the case. The statute was measured entirely by the 15th amendment.

Schnell v. Davis, 336 U.S. 933, is discussed by Judge Cameron at page 180 of his opinion.

It is true that in *Williams v. Mississippi*, 170 U.S. 213, certain provisions of Mississippi's law as to qualifications of electors were considered with respect to an attack made on them as being violative of the 14th amendment. This case antedated *Guinn* and *Lane v. Wilson*. Evidently counsel did not make the point that such statutes were not susceptible of attack under the 14th amendment. It made no practical difference in the case as the Court held that they did not discriminate between the races, and it had not been shown that their actual administration was evil.

In *Lassiter v. Northampton Education Board*, 360 U.S. 45, the Court considered the question to be "whether a State may consistently with the 14th and 17th amendments" (p. 50) and cited first in its discussion *Guinn v. United States* in which the applicability of the 14th had not been considered.

When the Court considered the Texas primary laws in *Grovey v. Townsend*, 295 U.S. 45, it held that they denied no right given under the 14th or 15th amendment. When it was overruled in *Smith v. Allwright*, 321 U.S. 649, it was on the basis of a violation of the 15th amendment (p. 666).

Laying all cases to one side except *Minor v. Happersett*, let us examine the forbidding clauses of section 1 of the 14th amendment.

They are three in number.

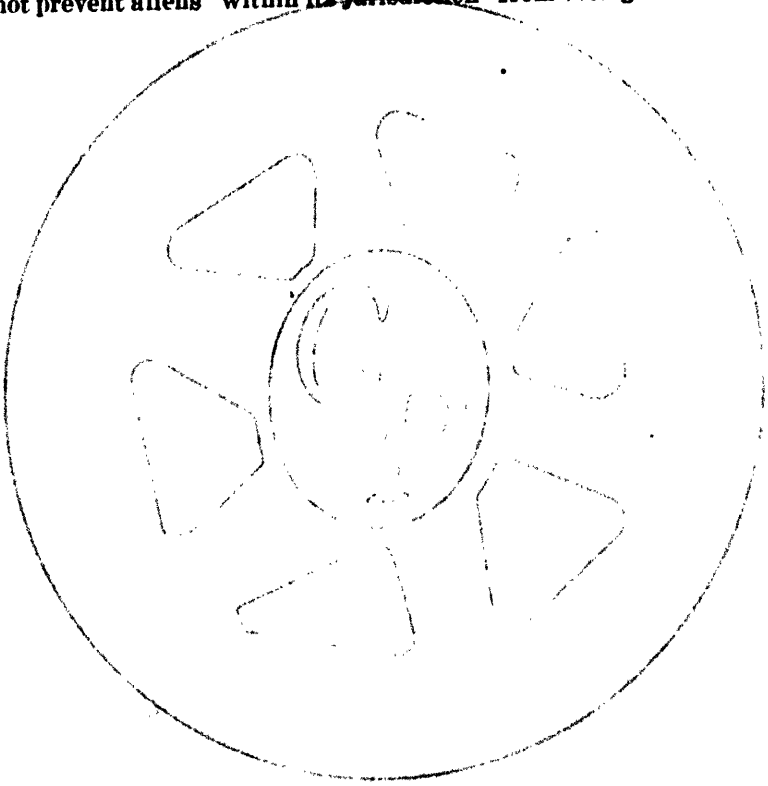
First is "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *". It is the only one of the three clauses which uses the word "citizens," the only one which limits protection to "citizens." Yet, it was held not to be sufficiently strong

to permit women to vote prior to the adoption of the 15th amendment. (*Minor v. Happersett*, supra.)

Next is "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *". Corporations are "persons" within the meaning of this clause (*Covington etc. Turnpike Road Co. v. Sandford*, 164 U.S. 592, and numerous other cases) so clearly it has no application.

The third clause is: "* * * nor deny to any person within its jurisdiction the equal protection of the laws * * *". It also applies to corporations. It also applies to residents, alien born (*Truax v. Raich*, 239 U.S. 33) and even to aliens who are ineligible to citizenship (*Sei Fujii v. State*, 38 Cal. 2d 718). Certainly a State may prohibit an alien or one not a citizen of the State from voting. Certainly it could not if the equal protection clause was intended to apply to voting privileges.

Under this new theory of the 14th amendment will it now be urged that a State cannot prevent aliens "within its jurisdiction" from voting?





LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

WEDNESDAY, APRIL 11, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:12 p.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee), presiding.

Present: Senators Ervin (presiding), Eastland (chairman of the committee), and Stennis.

Also present: William A. Creech, Chief Counsel and Staff Director; and Bernard Waters, Minority Counsel.

Senator ERVIN. The subcommittee will come to order.

Senator EASTLAND. Mr. Chairman, I want the honor of presenting the present Lieutenant Governor of Mississippi, the Honorable Paul B. Johnson.

His father was a very distinguished Governor of the State. In fact, he was one of our outstanding Governors. He made one very grave mistake, and that was when he appointed me to the U.S. Senate.

Senator ERVIN. Well, I do not like to argue with my chairman, but I disagree with my chairman's statement.

Senator EASTLAND. Mr. Johnson, the present Lieutenant Governor has made an outstanding record as a lawyer, an outstanding record in the business world and in public life, and I certainly commend him to you.

He is a man of unimpeachable integrity and very great ability.

Senator ERVIN. The subcommittee is delighted to have you with us.

Mr. JOHNSON. Thank you, Senator.

Senator ERVIN. I believe we have a witness with a short statement, and if it is all right with you, we will let him testify first.

Mr. JOHNSON. Thank you, Senator. I am here at your pleasure.

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Mr. Al Hartnett, the secretary-treasurer of the International Union of electrical, Radio and Machine Workers. Mr. Hartnett.

STATEMENT OF AL HARTNETT, SECRETARY-TREASURER, INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS

Mr. HARTNETT. My name is Al Hartnett. I am secretary-treasurer of the International Union of Electrical, Radio, and Machine Work-

ers, AFL-CIO. I appreciate very much the opportunity of appearing before you today to present the view of my organization.

Our basic position on legislation before the subcommittee is that we support any effort to extend and protect the right of citizens to vote for their representatives. We take the position that a representative government to be truly representative must be chosen by as many citizens as is possible. Government becomes that much more government by the people as the proportion of voters increases.

We believe that it is not only the right of every qualified citizen to vote, it is his duty. We also believe that it is the right of every citizen to have his voting qualifications examined in the same way as every other citizen, with precisely the same criteria applied in precisely the same way.

We find that in every election, there are a great number of "lost" voters. By "lost" voters, I mean the difference between the number of people of voting age and the number of people who actually vote. This loss occurs in all the States. For example, in the presidential election of 1960, according to a poll prepared by the National Education Association, the national average of votes cast in the presidential election as a percent of the number of persons of voting age was 64.3. The State registering the highest percentage was Wyoming with 83.9 percent. Seventeen States of the 50 fell below the average for the 50 States and 9 States fell below 50 percent. In one State, the percentage of votes cast was 25.6 percent.

I submit that the loss of these votes is harmful to the democratic process and that it is the responsibility of the State and Federal Governments to take what corrective measures are available. We must consider the possibility that a percentage of the "lost" vote is a result of restrictive policies in application of the criteria used to decide which voters are properly qualified. Any subjective examination of a voter's qualifications leaves open the possibility that the citizen will be rejected for reasons other than failure to meet standard voting criteria. Officials in charge of voter registration are naturally responsive to their environment. If discrimination against minority groups exists in a community, we can expect that it will be reflected in the registration officials' actions.

So long as voter qualifications and judgment of them depends on the subjective decisions of registration officials, we must fear the conscious or unconscious use of registration machinery to discriminate against the voting rights of minority groups.

It is for this reason that we support the principle of objective testing of the qualifications of voters. We specifically support the idea that in all elections where State laws require a "literacy" or "understanding" or an "interpretation" or an "educational" test to determine whether a citizen is qualified to vote, a sixth-grade education qualifies the citizen as literate for the purposes of voting. We therefore support the appropriate section of S. 2979.

The Bureau of the Census in its measurement of illiteracy notes that in their sample surveys in 1952 and 1959 the literacy question was asked only of persons who had completed less than 6 years of school.

That report is published by the Census Bureau, in a report entitled "Population Characteristics."

The assumption is made by the Bureau of the Census that those who have completed 6 years or more of school are literate, that is, they can read and write a simple message, either in English or in any other language.

Having been exposed to the homework requirements placed upon sixth graders, being the father of a fifth grader and sixth grader, I am convinced that completion of six grades in an accredited school qualifies a person as literate. To give you an example of the literacy required in an average sixth-grade class, here are some titles of textbooks recommended by publishers and used extensively in sixth-grade classes in all parts of the country.

"Our English Language," grade 6, by Bailey, Barnes, and Horrocks, published by American Book Co., on page 47, item 10 is "Writing an Editorial":

Plan and write an editorial about some event or condition in your school. Be fair. If you criticize something, be sure to say how it can be improved.

I might suggest that some of our newspapers of today might well copy some of the suggestions made in this sixth-grade book. There we have a sixth-grade publication, a publication being used in the sixth grade, suggesting the writing of an editorial about a condition or an event existing in the school, urging fairness, urging criticism, if there is to be criticism, and cautioning the sixth grader to be certain to tell how that condition can be improved.

"English Is Our Language," grade 6, Sterling and Rice, published by D. C. Heath Co., Boston, page 306. The pupils are told to write groups of four sentences about three of the following situations. Choose other situations of your own, if you prefer. In each group, write a declarative sentence, an interrogative sentence, an imperative sentence—a polite request or a comment—and an exclamatory sentence.

Still another book used by sixth graders is "English for Meaning," grade 6, McKee and McCowen, published by Houghton-Mifflin Co., Boston. On page 52, under the heading "Gathering Information"—

By using the table of contents and the index of the book, you can find out quickly whether or not the book has information on your subject and, if so, where in the book that information is.

It seems to me that in the books quoted above it can be seen that the sixth-grade student is expected to handle the language with some precision, exercise practical judgment, and to learn the processes of finding information.

In a reading book for the sixth grade entitled "Arrivals and Departures" by Sheldon and Edwards, published by Allyn & Bacon, Inc., we find these opening lines of a story:

It was the evening of the 17th of September, in 1777, and a strange feeling of unrest hung over all Philadelphia. Everyone was sure that the Redcoats would march in almost any day now, to take over the city. For the Thirteen Colonies were at war with their mother country, determined to win their independence and become a free nation. * * *

This is the kind of reasoning, this is the kind of understanding, that is anticipated by this book on the part of the sixth graders.

In another reading book entitled "The Brave and the Free," published by D. C. Heath, Boston, in a story entitled "Beauty in Corn," the following lines appear on page 150:

In Illinois, the black soil lay deep and fertile. In Iowa, the fields promised a harvest rich enough to feed an entire hungry world. Missouri and Kansas were burdened with growing grain.

In a geography book, for grade 5, "Journeys Through the Americas," on page 106, we find the following:

The Tarheel State has three natural regions: the Coastal Plain, the Piedmont and the Appalachian Highlands. Part of the land near the coast is marshland. The southwestern part of the Coastal Plain has sandy soil which is not very fertile. Peaches and berries are grown there. The rest of the Coastal Plain and much of the southern Piedmont is good farmland. Tobacco and corn are the main crop. North Carolina raises more tobacco than any other State. Most of it is used to make cigarettes.

This is the kind of understanding and comprehension it is anticipated that sixth grade students ought to possess.

In a science book entitled "Science for Today and Tomorrow" for grade 6, by Herman and Nina Schneider, published by D. C. Heath, on page 102 is the following:

A compound is usually quite different from the elements of which it is made. Sugar, for example is a compound. It contains carbon, which is a black solid and two other elements, hydrogen and oxygen, which are gases. None of the three elements is either white or sweet like the compound sugar.

I submit that the understanding of this kind of material by a sixth grader would indicate unquestionably the possession of substantial literacy.

In a history book entitled "Our Country's Story," by Eibling, King, and Harlow, Laidlaw Bros., page 141, "Government by the People:"

The Americans were just about the first people to break away from their mother country. But there was more to the Declaration of Independence than that. There was a brand new idea in it that excited the people of the world. Do you know what that idea was? It was the idea that the people of a country shall make the laws and that the king or government should carry out the laws. Do you see what that idea means? Instead of the king or government being the master of the people, he was the servant of the people. He could no longer make laws he wanted. Instead, he would have to carry out the laws the people wanted.

The content and the vocabulary of these sixth grade textbooks clearly demonstrate, in my opinion, that the sixth grade student is expected to be informed about our country and about the world we live in. Certainly no one can deny that the student able to handle such matters is literate and is capable of informing himself and making the choices necessary to participation in the democratic process.

It should be noted that the definition of literacy used by the Bureau of the Census says—

that those persons are literate who can read and write a simple message either in English or in any other language.

We have found that there has been disqualification of citizens of a number of States who are otherwise qualified to vote, but whose only

language is Spanish. The following are just a few of the statements made by members of local 463, an IUE local in New York City:

My name is Juan Rojas from Caguas, P.R. In Puerto Rico I completed an eighth-grade education.

I lived in New York for the past 8 years. If they give the test in Spanish I am sure I could pass the test to register and vote like a good citizen should do.

JUAN ROJAS,
164 East 103d Street, New York City, N.Y.

My name is Mercedes Barreto from Iajas, P.R. In Puerto Rico I completed in sixth-grade education.

I lived in New York for the past 10 years. I never registered because I don't know English well enough to take the test that is required. I wish they would give the tests in Spanish so I could vote.

MERCEDES BARRETO,
59 Beaver Street, Brooklyn, N.Y.

My name is Santos Serrano from San Sebastian, P.R. I completed an eighth-grade education in Puerto Rico.

I lived in New York for the past 4 years. I never registered because I don't know English well enough to take the test that is required. I wish they would give the test in Spanish so I could vote.

SANTO SERRANO SOLER,
149 President Street, Brooklyn, N.Y.

My name is Ignacio Nunez from Arecibo, P.R. In Puerto Rico I completed an eighth-grade education. I am 50 years old.

I lived in New York for the past 7 years. I never registered because I don't know English well enough to take the test that is required. I wish they would give the tests in Spanish so I could vote.

IGNACIO NUNEZ,
1199 Hancock Street, Brooklyn, N.Y.

I am Gumerindo Martinez, 62 years old, from Lajas, P.R. In Puerto Rico I completed sixth grade education. I lived in New York for the past 3 years. I have three sons and four daughters all over 21 years of age. They can't vote because they don't know English well enough to pass the test that is required. We will be very happy if the test were given in Spanish so we all can vote.

GUMERCINDO MARTINEZ,
712 Fox Street, Bronx, N.Y.

My name is Santa Fonseca from Patilla, P.R. In Puerto Rico I completed an eighth grade education. I am 50 years old.

I lived in New York for the past 12 years. I am a shop steward for IUE Local 463, in the Abbco Metalics Co., located in L.I.C. I help in negotiating the terms and conditions for the union contract.

My three daughters have voted in the past elections. If the test were given in Spanish I am sure I would be able to vote also.

SANTA FONSECA,
138 Ludlow Street, New York, N.Y.

Now, these American citizens, and I know from some association with them that they are extremely proud of their American citizenship, living in Puerto Rico, were given their choice of English or Spanish as their official language and they chose Spanish. This makes these citizens no less citizens. Where these citizens are otherwise

qualified, the information necessary for them to vote intelligently is available through Spanish language publications.

We support, therefore, that section of S. 2750 which eliminates lack of proficiency in English as a reasonable basis for excluding citizens from the right to vote.

We believe that the question as to whether various groups within our country are actually deprived of their vote is best answered by fact. Statistics on the numbers of citizens of voting age classified by race, color, and national origin, on the number in each classification who are registered to vote and on the numbers in each classification who actually vote are the best basis for an approach to an answer. We therefore support that section of S. 2979 which requires the Director of the Census to compile this information.

I would like to emphasize that although we support elimination of literacy tests for citizens who have completed six grades in an accredited school, we do not assume that such action would remove all barriers to the right to vote. We realize that if there is an intention to deprive certain groups of citizens of their right to vote; elimination by law of one repressive technique can simply result in its replacement by another. We therefore feel that the Congress should consider the problem of protection of voting rights from a broader viewpoint than simply elimination of literacy tests, even though we do support the legislation that provides for the elimination of literacy tests where a sixth grade education has been attained. We do not really believe that a piece-by-piece elimination of the various possible techniques barring voters from their rights can ever be successful. We endorse, rather, a general attack on all such techniques as is embodied in Public Law 2979.

The discriminatory application of legal qualifications for voters has been found by the U.S. Commission on Civil Rights to be a common technique of discriminating against would be voters on racial grounds. In one county it was found that: (a) Different colored registration application forms were used for white and Negro voters; (b) Registration and voting records were kept separately according to race. (c) Registration applications by Negroes were delayed longer than applications by whites. (d) Literacy tests requiring Negroes to read and write are more lengthy and difficult—paragraph of the State constitution and of the U.S. Constitution—that is required of whites. (e) Administering literacy tests so that Negroes are required to read aloud and to write from dictation while white applicants were required only to write by copying.

Senator ERVIN. Incidentally, if I may interrupt you without upsetting your train of thought, that is illegal under the laws of the State. In my State the Supreme Court has held that you cannot require a person to write from dictation.

Mr. HARTNERT. Well, we would get around—again, I am departing from my prepared statement, sir. Our position is that we can lend support to the State laws that are on the books of your State.

Where there are no such State laws to protect people we can, by the passage of Federal legislation, exclude the possibility that there will be discrimination in the application of literacy tests, by having this hard-and-fast method for determining who is a literate person.

And, of course, it goes one step further. Occasionally, as we point out in this testimony, some States or some people within communities, being susceptible to the kinds of patterns which exist in the State, are inclined to administer the laws with a consciousness of the kinds of patterns that do exist.

The kind of legislation proposed here would remove that temptation upon those local officials.

I now go back to my prepared statement.

(f) Administering literacy tests to Negroes singly while administering such tests to white applicants in groups. (g) A higher standard of literacy was required of Negroes than of white applicants, and these, I remind you again, are the findings made by the Civil Rights Commission.

In another case described by the U.S. Commission on Civil Rights in its 1961 Report on Voting, it is noted that in another county in another State, qualification tests were used in a discriminatory manner. The report states that—

Negroes were invariably required to copy out a provision of the constitution and, "more often than not," were required to copy, in full, article II of the U.S. Constitution. On the other hand, white applicants either took no writing tests, or were permitted to copy short provisions of the constitution.

The Court in this case noted that most of the Negroes in Macon County, Ala., live and work in the Tuskegee beat where Tuskegee Institute and the veterans hospitals are located. The Court further noted that the majority of the many Negroes associated with these institutions have a college or high school education.

The Court observes and I quote from their opinion :

The discrimination against these Negroes has been so effective that many have been unable to qualify as voters, while many white persons who have not finished grammar school have been registered. (Opinion of the Court, *U.S. v. State of Alabama*, 1961).

The problem of voter qualifications is not restricted to Negro citizens or Spanish-speaking citizens. The elimination of subjective decisions on voter qualifications might, in some areas, protect those who have, until now, been the beneficiaries of these practices. There is a good possibility that many existing repressions of the right to vote stem from the fear of what might happen if groups now dominated actually gain control. It is conceivable, taking the long view, that objective standards for voter qualifications may preserve the right to participate in the democratic process for presently dominant groups of citizens who in the future might find themselves in a minority in the community.

It is with this view of protecting the rights of all citizens to exercise their franchise that we support the idea of objective measurements which are applied uniformly as a matter of right.

I would like to remind the committee, through its chairman, of the promises made by the party platforms in 1960. The Republican platform pledged :

Continued vigorous enforcement of the civil rights laws to guarantee the right to vote to all citizens in all areas of the country.

Legislation to provide that the completion of six primary grades in a State accredited school is conclusive evidence of literacy for voting purposes.

The Democratic platform promises :

We will support whatever action is necessary to eliminate literacy tests. * * *

I would like to remind representatives of both parties of the titles of their platforms. The Republican platform was published under the title "Building a Better America," and the Democratic platform was called "The Rights of Man."

And we believe that the building of a better America, insuring the rights of man and insuring the preservation and expansion of our democratic society's interest can best be served by passage of the legislation which precludes the requirements for literacy tests and assumes that the completion of six grades of education in an accredited school is sufficient to demonstrate and establish the literacy of an individual.

Thank you for your attention, Mr. Chairman.

Senator ERVIN. The subcommittee wishes to thank you for your statement which has been very interesting.

I have one comment to make off the record.

(Discussion off the record.)

Senator ERVIN. Dean Griswold of Harvard Law School appeared recently and disclosed some interesting figures. I called his attention to the fact that the nonwhite population of the United States is in excess of 10 percent of the total population. I asked him how many nonwhites were registered in the law school of which he is dean, that is what percentage of nonwhites were found in the student body of the law school of which he is dean, and he admitted that there are only 2 percent.

I said, "Well, now, it would be very unjust to infer from the fact that the total nonwhite population in the United States exceeds 10 percent that Harvard Law School was discriminating in admitting nonwhite students because they only have 2 percent, would it not"?

And he said it would.

Mr. HARTNETT. Mr. Chairman, I am sure that the dean can better defend Harvard Law School than I can.

On the other hand, I can speak about my union with some authority, and I can say this to you.

If you were to ask me a question of how many Negroes do we have as members of our union I, frankly, would not be able to answer the question for you, because we do not make distinctions between people because of their race, their color, or creed, or national origin.

We give everyone membership and, under the circumstances, I think this permits us to exercise a higher degree of democracy in operation of our affairs.

Our union, like most unions, is constructed in a manner which permits it to operate somewhat as does the U.S. Government.

We think that the principles, which we find good, would be equally good when embraced and embodied or employed by the Government.

What we are suggesting then, as a union, is that we will not accept the idea that people want to be discriminated against because of their race, color, or creed, or national origin. We would not like to resort to any devices which permit that to happen. We do not do that.

We think that the Government of the United States and the government of any State ought not to discriminate against any of their citizens because of their color or creed or national origin.

To the contrary, we ought to encourage more participation in our democratic affairs.

Senator ERVIN. What I was leading up to was the suggestion that there are a lot of other factors in the equation.

Now, you take in my State, which is North Carolina, both Dean Griswold and the Attorney General have absolved my State from having any substantial sins in this respect.

I saw figures the other day to the effect that 53 percent of the people of North Carolina voted in the last presidential election.

North Carolina has 100 counties in it, and many of those counties are strongly of one party, Democratic, as a result of several factors, one of which was the passage of unfortunate laws during Reconstruction. There is only one ticket running in the fall election in those counties.

We also have some counties that are strongly Republican. And then we have some, like mine, where they are about 50-50.

In the counties which are strongly Democratic the nominations are made in the primary and, for all practical intents and purposes, there is only one ticket in the fall and only one vote needs to carry that county. No one needs a whole lot of money to get people out to vote for him when nobody is running against him.

For most counties there is heavy voting in the primaries but no voting or low voting in the general elections, for that reason. In the Republican counties the same rule applies when the county is strongly Republican.

Now, in a county like mine, where we have about 10,000 Democrats, 10,000 Republicans, and 2,500 independents, in the last election we cast 23,000 votes. Considering the population is just over 50,000, this is as good a record, I think, as you will find anywhere in the United States, because most of those not voting were not old enough to vote.

Mr. HARTNETT. Now, I think the conclusion you suggest to me is that the figures may not be precisely accurate because a lot of people just do not bother to participate in elections because the results of the election are a foregone conclusion.

Well, that is the kind of a situation which I, candidly, say to you I believe ought to be corrected, because there may one day be a two-party system in those areas. I say this as a registered Democrat, by the way. There may one day be a two-party system.

It would be well if people were already equipped with the right to exercise their franchise, and I do believe that a two-party system is fundamental and necessary to provide the checks and balances which are required in our society.

So I would not like to—

Senator ERVIN. We have an active two-party system in North Carolina. The Republicans cast a very considerable vote there. I know a few North Carolina counties where the Republicans are so strong that at one time there were not enough Democrats to act as election officials.

Mr. HARTNETT. That may be true about North Carolina but here we are contemplating legislation which will not merely apply to North Carolina.

Take, for example, the one State mentioned here, which had 25.6 percent of its eligible citizens vote in the last presidential election. I am not sure that all the fine things that you say about North Carolina can safely be said about that State which, I think, is the State of Mississippi.

So we are talking here about a much more broad concept and context. So all the fine situations and circumstances which may exist in the State of North Carolina do not find themselves duplicated in the other States, and the citizens of those other States are no less deserving of the right to vote, the right to be registered or qualified to vote, than the citizens of North Carolina.

It is because of this that we support this kind of legislation.

Senator ERVIN. Now, I do not believe you are a lawyer——

Mr. HARTNETT. Sir?

Senator ERVIN. You are not a lawyer?

Mr. HARTNETT. No, sir; I am not a lawyer.

Gosh, I want that clear for the record.

Senator ERVIN. So I will not ask any questions dealing purely with the legal aspects of this legislation.

I appreciate your statement. I certainly do not quarrel with the proposition that all men, in like circumstances, should be treated alike.

You have read some very interesting extracts from schoolbooks and have made many interesting comments, and I appreciate your coming before the subcommittee.

Counsel may have some questions.

Mr. HARTNETT. Thank you very much, Mr. Chairman.

Mr. CREECH. Thank you very much, Mr. Chairman.

I would like to ask several questions with regard to your statement.

Senator ERVIN. May I just say this? This is off the record.

(Discussion off the record.)

Mr. CREECH. Mr. Hartnett, in paragraph 2 of your statement, the first page, you say that:

Our basic position on legislation before the subcommittee is that we support any effort to extend and protect the right of citizens to vote for their representatives.

Now, I presume by that statement, sir, that you mean the entire International Union of Electrical & Machine Workers supports any constitutional effort; that you would not condone, for instance, an effort which the Attorney General of the United States, as our chief law enforcement officer, would say is unconstitutional.

Is that correct?

Mr. HARTNETT. Mr. Chairman—pardon me, sir—counsel, I suppose we in the IUE are about as sensitive about constitutional rights in this point of our existence as we can possibly be. We are all for actions that are constitutional.

Now, I am not equipped to judge the validity of any position taken as constitutional or unconstitutional on any piece of legislation by the Attorney General.

But having a deep and high regard for the members of the Kennedy family, as I have, I would give a great deal of consideration to any position taken by the Attorney General if he said a particular piece of legislation was constitutional and needed no amendment to the Constitution.

I rely largely upon him.

Mr. CREECH. You say you would rely very strongly upon the representations of the Attorney General in such matters as constitutionality of legislation which might be before the Congress?

Mr. HARTNETT. I think the Attorney General is a competent attorney.

I think he would not be in the position he is in if he were not.

I, therefore, respect the opinions he holds.

Mr. CREECH. Excuse me, I do not want to be personal, and I am not speaking in terms of the present Attorney General.

I am speaking of the "Attorney General" in the context of his being the No. 1 law enforcement officer of the country, who is asked by the Congress to report on the various bills which are before it.

Mr. HARTNETT. Yes.

Mr. CREECH. And I mean it only in that context.

Mr. HARTNETT. Well, I would—and I would again then address myself to the question in the broad context.

I would presume or I would like to think that any person appointed to the position of Attorney General, at any time in the country's history, would be a qualified man, competent in his field, and under those circumstances I would lend a great deal of weight to his judgment as to whether or not a proposed piece of legislation was, indeed, constitutional or not constitutional.

Mr. CREECH. Yes, sir.

Now, on page 8 of your statement you say that you endorse S. 2979 which, you feel, is a broader bill than the other two bills which are before the subcommittee, S. 2750 and S. 480.

Sir, the Attorney General of the United States, Mr. Kennedy, was a witness before the subcommittee yesterday and at that time the Attorney General said, and I am quoting his statement:

If we were setting qualifications for individuals then I believe that it would be unconstitutional and would require a constitutional amendment.

The Attorney General made this statement after explaining that, in his view, the bill which is called the administration bill, S. 2750, does not presume to set voter qualifications. He then said that if Congress were setting qualifications for individuals then he believed it would be unconstitutional and would require a constitutional amendment.

Now, sir, the bill which you have said that your union endorses, 2979, includes a section 2, which is headed "Voter Qualifications" and which includes recommendation of the Civil Rights Commission that voter qualifications be limited only to four things: Inability to meet reasonable age requirements; inability to meet reasonable residency requirements; legal confinement at the time of the election or registration; and conviction of a felony.

This bill, in light of the Attorney General's statement, since it presumes to set voter qualifications, would be, apparently in the judgment of the Attorney General of the United States, unconstitutional.

I wonder, sir, in view of the Attorney General's statement if your union would like to reconsider its position?

Mr. HARTNETT. No, sir. I do not think there is any inconsistency between the position taken by the Attorney General and the testimony offered by me for our union.

We have, as you pointed out, taken the broad position that our basic position on legislation before this subcommittee is that we support any effort to extend and protect the rights of citizens to vote for their

representatives. Now, you may not have read my statement about 2979, as I intended——

Mr. CREECH. Yes, sir; I read your whole statement.

Mr. HARTNETT. Yes, sir. Well, I say, on our behalf, that we support that section of 2979 which requires the Director of the Census to compile certain information.

We did not, per se, endorse 2979.

Mr. CREECH. I see. Well now, I will come to that, too, in just a moment, but may I assume from what you have just said, then that your organization would only support that aspect of 2979 but, perhaps, would lend its support to the administration's bill rather than to 2979?

Mr. HARTNETT. I am sorry?

Mr. CREECH. May I assume, sir, from what you have just said that your union would only support that section of 2979 which pertains to the census requirements and would support, instead, the provisions of S. 2750, the administration bill?

Mr. HARTNETT. We would, generally, be in support of all of the provisions of 2750, 2979, or any other legislation presently before the committee which has as its purpose the expansion of a person's right to vote and is still within the framework of the Constitution of the United States.

Mr. CREECH. And if the Attorney General of the United States, as the chief law enforcement officer, indicated that any bill which would attempt to set voter qualifications, as such, would be unconstitutional, if that were true, what would be the position of your union with regard to that measure?

Mr. HARTNETT. I believe, if we carefully considered, examined, and thought about the Attorney General's position on that subject, with all due deference being given to his position, as the chief law enforcement officer of the Nation, and every respect for his judgment, we would arrive at our own independent conclusion.

I tell you, very frankly, we would be conscious always of the things he had to say about it. We would then make our decision on that piece of legislation, based on our own conclusions as to its constitutionality and its usefulness, but we will be guided very largely by the opinions of men like the present Attorney General and others who occupy the Attorney General's office.

Mr. CREECH. Well, of course, as I indicated earlier, my original question was directed to your statement, and I am quoting from your statement on page 8:

We endorse rather a general attack on all such techniques as is embodied in Public Law 2979.

That is where I got the idea that you meant you were endorsing that particular bill.

Now, with regard to the section 5 of 2979, which would require the Director of the Census to compile comprehensive information and statistics relating to the registration of voters in each State and the number of persons of voting age in each State classified by race, color, and national origin; and insofar as it is possible to ascertain, the number of persons of each such classification who have voted in any election since January 1, 1950—I wonder, sir——

Mr. HARTNETT. "1960," sir.

Mr. CREECH. What did I say? 1950!

Mr. HARTNETT. Yes.

Mr. CREECH. I am sorry. I meant 1960.

How do you equate your support for that provision with what you have just said to Senator Ervin, that in your union you do not make any distinction with regard to race, creed, and national origin, and you go on to say—

Mr. HARTNETT. I said race, creed, color, or national origin, sir.

Mr. CREECH. Oh, did you? I misunderstood you. "Color" instead of "creed"?

Mr. HARTNETT. Not instead of "creed."

I said race, creed, color, or national origin.

Mr. CREECH. Well, if you said "color" then I did not hear you.

I heard only the one word but, at any rate, let the record show that you did say that.

Then you went on to say that it is your feeling that this contributes to a greater degree of democracy in conducting your affairs and you think that the system your organization employs would be equally as good if embraced by the Government.

Well, sir, if the Government would embrace your system it would absolutely preclude making racial distinctions.

Now, I do not understand why your organization operates on this basis which you say contributes to the greater degree of democratic process in the conduct of your affairs, if you favor the Government's doing something inconsistent with that policy.

Mr. HARTNETT. Well, we have two different kinds of situations existing.

First of all, let me say that I said about our union, and other unions, that they are conducted, their structures, their framework, their methods of operation, are very much similar to the methods of operation employed by the U.S. Government.

We have two different kinds of situations prevailing. We have no discrimination in our union.

We have no disqualification of people on rather flimsy grounds of their right to participate in the selection of their officers. We have no such problems.

Now, on the other hand, we do have these kinds of problems in our fine country, in many sections of this country, with respect to the right of people to exercise the franchise which we think they are entitled to as citizens.

Since we do have a particular kind of problem we need to find out what is being done in order to correct the problem.

So, therefore, we support this piece of legislation, this section of this legislation so as to throw light upon the problem permitting us to take whatever steps eventually become necessary to provide the cures for the problems.

I would not be opposed at all if people in the International Union of Electrical & Radio Machine Workers of the AFL-CIO were being deprived of their constitutional rights to having the kind of study made to insure those constitutional rights, as that proposed by section 5 of S. 2979, but they are not two similar situations.

We are dealing, in the one instance, with one kind of a situation where the problem of discrimination, the problem of depriving people of their constitutional rights, does not exist.

While, on the other hand, we run into the situation where there is real reason to believe, and I am convinced, and my union is convinced, that people have been deprived of their constitutional right to vote for the candidates of their choice for public office, because of some, well, improper treatment, prejudicial treatment taken against them.

So we are dealing with two different kinds of situations in different manners.

Mr. CREECH. Well, I agree with the position of your union, personally, and I think that this is certainly something that is more and more being considered in this country to be the proper policy—that you do not ask people their race or their religion or any other irrelevant matter if otherwise qualified.

These are immaterial considerations. I would certainly agree with your statement that it would contribute to a greater degree of democracy.

What I am trying to clarify for the record is which statement you subscribe to, because you said one thing in your colloquy with the chairman, and yet you indorse a bill by calling for an entirely and distinctly contradictory position.

That was the only thing I wanted to have you make clear.

Mr. HARTNETT. I beg to disagree with you if you suggest there is an incongruity in my colloquy with the chairman as against my testimony.

I do not think there is. I want to impress upon you—

Mr. CREECH. That is why I am—

Mr. HARTNETT. When I was discussing it with the chairman I was discussing one type of policy which exists in our union. These are the facts.

Mr. CREECH. What I am saying is that you said that the Federal Government, and here is exactly what you said,

I think the system we employ would be equally good if embraced by the Government.

Those are your exact words and that, of course, is not what this bill proposes. The bill proposes exactly the opposite.

Mr. HARTNETT. The system that I spoke about, sir, was the system of not discriminating against any member of an organization in their right to exercise whatever constitutional liberties they possess.

Mr. CREECH. Well, I just wanted to give you the opportunity to clarify it, and I think you have done so.

Mr. HARTNETT. I wanted also to make it clear—you suggest that I do want to eliminate prejudices only in voting. I think I want the position of our union to be clear.

We are opposed to prejudice against people because of their race, creed, color, or national origin in any field of life, the right to employment, and so forth.

Senator ERVIN. Now, as I read the Constitution of the United States, it gives the States certain constitutional rights, one of which is the right to prescribe the qualifications of voters.

I assume that your organization would not favor legislation which attempts to secure the constitutional rights of some persons and deny the constitutional rights of the States, would it?

Mr. HARTNETT. Well, sir, our organization is not for doing anything which infringes upon the constitutional rights of anyone, State, municipality, or individual.

But what I want to suggest to you, sir, is that I am not a constitutional lawyer.

Senator ERVIN. You stated that.

Mr. HARTNETT. And I am not equipped to argue with you the merits of a State's position as against an individual's position.

Senator ERVIN. In other words, your position is that you favor the principle embodied in these bills, and that you would like for that principle to be put into effect in any manner which is constitutional?

Mr. HARTNETT. Yes, sir. We subscribe to the principles, the basic principles, enunciated by these bills.

We subscribe to the purposes for which the bills were proposed and we subscribe to the idea basically that all American citizens are to be encouraged in the exercise of their franchise to vote for the candidates of their choice in elections.

And we believe that we ought to do everything possible to make that more easy for these citizens.

Senator ERVIN. Do you have any questions?

Mr. WATERS. Just one, if I may, Mr. Chairman.

I take it your union has a system of dues and a man who pays his dues has a right to vote in the union affairs?

Mr. HARTNETT. Yes, sir.

Mr. WATERS. In your union, a man whose service might be compelled in military service, and when taxes are exacted by the Federal Government, he would have a choice, a right to exercise his franchise for Federal officials.

Is that correct?

Mr. HARTNETT. I am sorry, but I did not understand the last part of your question.

Mr. WATERS. If a man pays his taxes he is entitled to vote?

Mr. HARTNETT. Yes, sir.

Mr. WATERS. That is your position?

Mr. HARTNETT. I would say yes.

If a man is paying his taxes and he is otherwise qualified to vote I would say, yes, we believe he is entitled to vote.

Mr. WATERS. Thank you.

Thank you, Mr. Chairman.

Senator ERVIN. The subcommittee appreciates very much your coming before us and giving us your views and the views of your organization on this very important question.

Thank you.

Mr. HARTNETT. Thank you very much, Mr. Chairman, and thank you for the courtesy extended to our organization and to me personally.

Mr. CREECH. Mr. Chairman, the next witness is the Honorable Paul B. Johnson, Lieutenant Governor of Mississippi.

**STATEMENT OF PAUL B. JOHNSON, LIEUTENANT GOVERNOR,
STATE OF MISSISSIPPI**

Senator ERVIN. Governor, we are delighted to have you with the subcommittee today and we appreciate your coming here from Mississippi to give us the benefit of your views on these bills.

Mr. JOHNSON. I thank you, Senator Ervin.

Mr. Chairman and members of the committee, I appreciate the invitation of your chairman to appear before this committee and express my views upon S. 480, S. 2750, and S. 2979. The same basic fallacies exist in all three of these bills.

My remarks will be directed to the contents of S. 2750. I request that when I refer to S. 2750 the committee accept my statements as applying to all three of these bills.

I oppose these bills and assert they should be rejected by this committee and the Congress of the United States.

The reasons why I oppose S. 2750 and the other bills are: They are unconstitutional, unsound, unwise, unnecessary, untrue, vague, and ambiguous; they represent an effort to have Congress usurp long-established and never departed from rights of the States to determine the qualifications of the electors or voters for Representatives and Senators in Congress and presidential electors.

They constitute efforts to draw into the "voracious maw of federalism" rights of the States recognized by the Constitution of the United States and approved by every decision of the United States Supreme Court, lower Federal courts and State courts of this Nation which have dealt with the question.

The portions of the Constitution of the United States which S. 2750 basically violate are as follows:

Article I, section 2, clause 1:

The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The 17th amendment, paragraph 1, effective April 8, 1913, altering the original article I, section 3, clause 1:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Article II, section 1, clause 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

S. 2750 is not justified and is not authorized under article I, section 4, clause 1, of said Constitution, which is as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

There are 21 States which have some sort of literacy requirement as a prerequisite to eligibility for registration to vote, if the requirement in Nebraska that the voter sign his name be considered a literacy requirement, and I think it is.

Arizona, California, Delaware, Maine, and Massachusetts require that the registrant be required to read a section of the State or Federal Constitution and write his own name.

Alabama, New Hampshire, North Carolina, Oklahoma, and South Carolina require that the elector be able to read and write a section of the Federal or State Constitution.

Alabama requires that the voter be of good character and embrace the duties and obligations of citizenship under the Federal or State Constitutions.

Georgia requires that the voter read intelligently and write legibly a section of the State or Federal Constitution. If he is physically unable to do so, he may qualify if he can give a reasonable interpretation of a section read to him.

An alternative means of qualifying is provided: If one has good character and understands the duties and obligations of citizenship under a republican government and can answer correctly some 20 or 30 questions listed in the statute, he is eligible to vote.

Louisiana requires an applicant read and write English or his mother tongue if he is of good character and understands the duties and obligations of citizens under a republican form of government. If he cannot read and write, he can qualify if he gives a reasonable interpretation of a section of the State or Federal Constitution that has been read to him and if he is attached to the principles of the Federal and State Constitutions.

Mississippi requires that the applicant must be able to read and write a section of the State constitution and give a reasonable interpretation of it.

He must also demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government, and unassisted fill out an application to register in his own handwriting.

New York and Wyoming require that the voter read a constitutional provision in English.

Virginia requires the application to register to be written in the applicant's handwriting before the registrar, without aid, suggestion, or memorandum.

Washington requires that the voter be able to read and speak the English language.

Hawaii determines the voter's capability by his reading and writing either the English or Hawaiian language.

Nebraska requires that the applicant sign his name when registering.

The validity of the Mississippi literacy test will be fully developed hereinafter, but, at this point, I mention that Mississippi's literacy test has been fully and squarely sustained by the cases of *Williams v. Mississippi*, from the United States Supreme Court, decided in 1898, (170 U.S. 213, 42 L. Ed. 1012), and *Darby v. Daniel*, (168 Fed. Supp. 170, (decided November 6, 1958, by a three-judge court and from which there was no appeal)).

The source of the basic provision of S. 2750, the provision that completion of a sixth primary grade education will satisfy all literacy requirements and prohibit any State from imposing many other literacy requirements, is taken from recommendation No. 2 of the Federal Civil Rights Commission found in its 1961 report at page 141.

Literacy or educational tests have been in force for many years and, until the advent of the so-called Civil Rights Commission, no Federal department, as far as I know, has ever sought to so debase the franchise.

One of the most misunderstood and erroneously used expressions, which has been too frequently used in this Nation, is that the right to register and vote for Representatives and Senators in Congress and presidential electors is given and granted and secured by the Constitution of the United States and the Federal Government.

Whether the right exists is not the question posed by S. 2750 to this committee, to Congress, and to me upon this hearing.

The real or basic questions before this committee, the Congress, and with which I must deal in this hearing are:

What entity the State or the Federal Government through the Constitution and its laws grant or extend the franchise to the persons who vote for Representatives and Senators and Congress and presidential electors, and to whom is the franchise or the right to vote for said officers extended?

The answer to the true basic questions so posed is: The right to vote or the franchise is extended by the States, and the States alone; the person or persons to whom such franchise is extended are those persons who under the constitution and laws of each State are qualified to vote for members of the most numerous branch of the legislature of the respective States.

A further answer to these basic questions is that the power granted to Congress under article I, section 4, clause 1, relating to the time, places, and manner does not vest in Congress the right to modify or control the States in the exercise by the States of full power and authority over setting and determining the qualification of the electors of said officers.

Before going into a full discussion of the basic constitutionality of S. 2750, there are some observations concerning the face of the bill and some of its imperfections which should be made, and certain "landmarks" and constitutional principles should also be briefly discussed. Time will not permit, of course, covering all of the defects, imperfections, and fallacies of this bill.

At this point, there comes to my mind a statement made by Justice Ben F. Cameron of the Fifth Circuit Court of Appeals in the case of *Darby v. Daniel*, 168 Fed. Supp. 170. Justice Cameron, who, in my opinion, is one of the ablest judges ever to adorn a Federal bench, writing for the court in *Darby* and sustaining the validity of the Mississippi literacy test against an assault charging that it violated the 14th and 15th amendments, speaking for the court, says at page 183:

At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the Government of this country and of the States.

I find it difficult to believe that the contents of the preamble or legislative findings contained in S. 2750 are known by Congress to be true or that they are true.

In several places in the preamble, the words "reasonable" and "unreasonable" are used. In my judgment, this would be an impermissible effort on the part of Congress to define words in said section 2 in article 1 or amend by way of definition said section 2.

Of course, patently, Congress, as the Federal Legislature, has no power to define any word in the said Constitution and cannot amend it by way or guise of defining or limiting one or more words—Congress cannot construe the Federal Constitution.

No State legislature can define any words or limit any words of the State constitution or amend it under the guise of a definition. Any effort on the part of Congress to construe by definition, or otherwise, any part of the Constitution would be a usurpation of the power and prerogatives of the Federal courts as given under article III of the Constitution.

Subsection E, dealing with those persons who are literate only in the Spanish language, is, I believe, flatly contrary to the holdings and pronouncements contained in the case of *Camacho v. Rogers, et al.*, 199 Fed. Supp. 155, decided October 19, 1961.

This was a case filed by persons literate in Spanish only to enjoin the enforcement of the New York State and constitutional provisions requiring literacy in the English language as a prerequisite as an eligibility to vote.

Here the Court sustained the provisions of the New York laws, and held that same were not violative of the 14th and 15th amendments or any other section of the Constitution, and at page 160 says:

He is not being denied the right to vote because of race, creed, or color, but because of his illiteracy in the English language.

How does Congress know, if it does, that all persons literate only in the Spanish language are qualified to exercise the franchise?

As to subsection D of the preamble, upon what knowledge does Congress seek to find that all graduates of the sixth primary grade cannot be denied the franchise on the grounds of illiteracy?

As to subsection F of the preamble, where in article 1, section 4 of the Constitution or in section 5 of the 14th amendment, or in section 2 of the 15th amendment, is any duty cast upon Congress?

S. 2750 is drawn in vague and ambiguous terms; some examples of this are:

(At this point Senator Stennis enters the hearing room.)

Mr. JOHNSON. Section 2, lines 11 through 14, states an artificial definition of discrimination under the terms "deprivation of the right to vote."

From a practical standpoint, a registrar of elections is given an impossible task—that of determining which one of the many persons who come before him are "similarly situated." What does this mean? Does it mean of comparable size? financial worth? or intelligence and education?

How can a registrar determine the comparable education or intellect of persons who come before him without giving each an intelligence test, and then going back and comparing the various tests, one with the other? Such, of course, produces a ridiculous situation.

The artificial definition of "discrimination" by the definition of "deprivation of the right to vote" also appears to be an effort to write out and void volumes of law which have been written by the State and Federal courts in defining what is or is not discrimination in voting matters.

How broad, and what is encompassed in the words "standards or procedures" in line 13, page 3, section 2, of the Senate print?

What is meant by the words, in lines 16 and 17, page 3, section 2, "on account of his performance in any examination, whether for literacy or otherwise"? It appears to me that this portion of S. 2750 is broader than a mere literacy test.

Senator ERVIN. If I may interject at that point, I would like to say that that was conceded by Dean Griswold of the Harvard Law School who was speaking on behalf of the Civil Rights Commission.

Under examination he admitted that that was too broad in that it would permit an insane person to vote in violation of State law, provided an insane person had completed the sixth grade before the person became insane.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And he said that would be changed by a minimum—

Mr. JOHNSON. The importance of the vagueness and ambiguity of S. 2750 is pointed up by the inclusion of the preamble and legislative findings. A casual student of civil rights cases has found how often the court has reverted to seeking the purpose and intent of Congress in enacting so-called civil rights legislation.

It is Hornbook law that, when a statute is vague and ambiguous the court may or should resort to a preamble or legislative findings in a bill to determine the true meaning of the statute and the intent and purpose of Congress. This, gentlemen, is what I call another fallacy of S. 2750. I think the preamble and proposed findings in this bill would be an effort on the part of Congress to influence and command the court to sustain the body of the bill, in violation by Congress of article 3, sections 1 and 2, of the Constitution of the United States. I believe that the recitals or findings appearing in the preamble of this bill are unwarranted and unjustified. That preambles and legislative findings have too often been resorted to to sustain an otherwise invalid statute, and the extent to which a court may resort in a preamble when a bill is ambiguous, is reflected in innumerable cases. We find many collected in 82 C.J.S. Statutes, section 349, Preambles and Recitals; U.S.S.C. Digest, Law Edition Statutes, key Nos. 118 and 119; West Publishing Co., Federal Digest Statutes, key No. 210.

Senator ERVIN. Well, I have interpreted the preamble and its clauses are something which the advocates of this bill use as a flattering unction to convince them that it is all right to do constitutional evil in the hope that some kind of good will come from it.

If you read the first two verses of the second chapter of Genesis you will see that this is exactly the same course of action that was taken by the serpent in the Garden of Eden to convince Eve that she should disobey the Lord's commandment by eating the fruit of the tree in the garden.

Eve disobeyed the commandment of the Lord in order that she might acquire knowledge.

That is exactly what these preambles do.

Mr. JOHNSON. Yes, sir. The difference is that both of them were banished from the garden.

Senator ERVIN. The preambles mean that if Congress passes this law and nullifies the simplest words in the Constitution; namely those in section 2 of article 1, and those in the 17th amendment, prescribing the qualifications for voters, Congress will nullify those parts of the Constitution and do constitutional evil in hope that some kind of good will result from it.

Mr. JOHNSON. Yes, sir; and they banished both of them from the Garden of Eden.

But where a court resorts to the preamble the court is home free, and it falls into Congress' lap where the preamble was written, upon which they try to justify the decision.

Senator ERVIN. All of which shows, added to these bills, instead of following the precedents set by the Supreme Court in *Williams v. Mississippi* and the *United States v. Quinn* and *Lassiter v. Northampton County*, and by the circuit court in the *Trudeau* case—they say they are not going to follow the precedents set down by the Supreme Court in interpreting the Constitution, but that they are going to follow the precedent of Mother Eve in committing the first sin of the world.

Mr. JOHNSON. Another fallacy of S. 2750 is its reference to "Federal election," and the definition of such an election in section 2 thereof. I say to this committee that there is no such thing as a Federal election, and that there can be no such thing as a Federal election because there are no Federal electors.

My assertion that there can be no Federal election is squarely sustained by the case of *Minor v. Happersett*, 21 Wall. 178, 22 L. Ed. 627, wherein at page 629 of the Law Edition report the Court says:

The United States has no voters in the States of its own creation. The elective officers of the United States are elected directly or indirectly, by State voters.

Again, we find this in *United States v. Cruickshank*, 92 U.S. 542, 23 L. Ed. 588, wherein the Court at page 592 Law Edition says:

In *Minor v. Happersett*, 21 Wall. 178, 22 L. Ed. 631, we decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States.

In *McPherson v. Blacker*, 146 U.S. 1, 36 L. Ed. 869, speaking of the course of the "right to vote" intended to be protected in the election of Senators and Representatives in Congress and Presidential electors, the Court says at page 878 of the Law Edition report:

The right to vote intended to be protected refers to the right to vote as established by the laws and constitutions of the States.

Another fallacy of S. 2750 is that it would have Congress set qualifications of persons who elect Presidential electors. Again, we find S. 2750 seeking to override decisions of the Supreme Court of the United States and other Federal courts holding a Presidential elector is a State officer. Thus, we find the advocates of S. 2750 seeking to have Congress set the qualifications of a State officer.

The case of *McPherson v. Blacker* (146 U.S. 1, 36 L. Ed. 869) conclusively holds that a presidential elector is a State officer and at page 877 of the Law Edition report we find:

In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *In re Green*, 134 U.S. 377, 379 (33: 951, 952) "no more officers or agents of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people of the States when acting as the electors of Representatives in Congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and Federal influence might be excluded.

Again, we find the lower Federal courts, in the case of *In re Green*, supra, and *Walker v. U.S.* (93 F. 2d 383, cert. denied, 303 U.S. 644), squarely holding that presidential electors are State officers and not Federal officers. At page 388 of the last mentioned decision we find the Court says:

It is contended by defendants that presidential electors are officers of the State and not Federal officers. We are of the view that this contention is sound and should be sustained (art. II, sec. 1, U.S. Constitution (citing also *Burroughs v. U.S.*, 290 U.S. 534, 78 L. Ed. 484)).

In my opinion, many people erroneously believe that the franchise is granted by the Federal Government, and that the 14th and 15th amendments extend the right of franchise to the people of this Nation. We have seen that the United States has no voters of its own creation because all elective officers of the Federal Government are elected directly or indirectly by State voters. The right of franchise, or the right to exercise it by voting, is not an incident of national citizenship. The right to register or vote is not a necessary incident of State citizenship. Registering and voting are privileges to be granted by the State to such persons who qualify under the State law.

The right or privilege of a person to vote for a Representative or Senator in Congress depends upon whether such person is in fact qualified under the law of his State of residence to register and vote in his State for a member of the most numerous branch of the State legislature.

The 14th amendment did not extend the franchise to anyone. The 15th amendment did not extend the franchise to anyone. The latter merely gave the right not to be discriminated against or denied the franchise and the right to vote on account of race, color, or previous condition of servitude; and Congress was thereby empowered to enforce this amendment by appropriate legislation.

We find at page 878 of *McPherson*, supra, the following:

The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. (*U.S. v. Cruikshank*, 92 U.S. 542 [23: 588]; *U.S. v. Reese*, 92 U.S. 214 [23: 563].)

When one has complied with State law and becomes a qualified elector of that State, he is then possessed of the franchise. Until and unless a person has acquired the franchise in accordance with State law, he is unable at any time or under any circumstances to vote for

a Representative or Senator in Congress, or presidential elector. After a person has become a qualified elector under State law, then and only then does any right arise in him to vote for Members of Congress—after he has acquired this right, then and only then is it that a right becomes guaranteed or secured by the Constitution of the United States.

Casting a ballot or voting is merely the exercising of a right of the franchise which the person has acquired under and in accord with State law. Therefore, if a person has not become a qualified elector under State law, then neither the Constitution of the United States nor anything else gives, grants, issues, guarantees, or establishes any right to vote in any election for Senators or Representatives in Congress, or presidential electors.

In view of the foregoing, it is now proper to consider who, under the Constitution of the United States, is given the right to vote for Representatives and Senators in Congress. Why was the Constitution drawn as it is?

Under the words "manner of holding elections" in article 1, section 4, does Congress have the power to take over from the States the matter of determining or specifying or writing the qualifications of the persons who can be registered under State law? Who has the franchise or right to vote for Members of Congress and presidential electors. Does the State or the Federal Government grant the right of franchise? Do we have occurrences or occasions which conclusively establish that the words "manner of holding elections" as used in article 1, section 4, clause 1, *supra*, does not authorize Congress to set or write the qualifications of electors in the States as proposed by S. 2750?

We have conclusive evidence and case authority to the effect that the framers of the Constitution never intended that Congress should ever have the power to set the qualifications for registering and voting of State citizens in the manner Congress now proposes to do by S. 2750.

In the Constitutional Convention convened at Philadelphia in May 1787 among the most cherished and highly valued prerogatives of the respective States was that each would determine what persons in each State were qualified to vote for the members of the most numerous branch of the respective State legislatures. Various States had different requirements. Women are not permitted to vote. The question of who could vote for Representatives in Congress and who should select the Senators were among the most controversial issues in the entire Constitutional Convention.

By reference to the document entitled "United States Formation of the Union" published by the Government Printing Office, and "The Making of the Constitution," 1937 edition by Charles Warren, we find what transpired in the Convention with reference to the adoption of the language now found in article 1, section 2, clause 1, and article 2, section 1, clause 2, of the Constitution.

During the Convention, and shortly before Wednesday, August 8, 1787, various proposals were made as to who would select or elect Representatives or Senators in Congress.

On this day, August 8, 1787, Gouverneur Morris, an able delegate from the State of Pennsylvania, proposed that the Federal Govern-

ment or Congress be given the power to change or determine who in the State would be the electors of the Representatives in Congress from each State. His proposal was that Congress itself should have the right, independent of the States, to determine who would select or elect in each State the Representatives in Congress.

On August 8, 1787, after debate and motion carried, the Constitutional Convention rejected the proposal of Gouverneur Morris and finally adopted what is now article 1, section 2, clause 1, which is that Representatives in Congress must be chosen or elected by the persons in each State who were the electors in that State qualified to vote for or elect the members of the most numerous branch of the respective State legislatures.

Neither the States nor their Representatives would ever have considered under any circumstances permitting the National Government to either enfranchise or disenfranchise citizens of the State independent of the power and authority of the State itself, or to bring about a situation where what was necessary to be done by a citizen to qualify or entitle him to vote for Representatives in Congress were different from that prescribed by the States to determine who would be qualified as electors of or eligible to vote for the members of the most numerous branch of the State legislature.

Having settled on Wednesday, August 8, 1787, what is now article 1, section 2, clause 1, the Convention adjourned for the day.

The next day, on Thursday, August 9, 1787, what is now article 1, section 4, clause 1, was voted upon and approved by the members of the Convention. On that day they adopted section 4 containing the words "manner of holding elections."

I say that on August 9, 1787, by using the words "manner of holding elections," they did not in fact, nor did they intend to, obliterate, change, amend, or destroy that which they so solemnly and clearly stated and determined the day before, on August 8, which was to make the State law determine who should be the electors of the most numerous branch of the State legislature control and determine who should elect Representatives in Congress.

If the language "manner of holding elections" gives Congress the right to enact the provisions of S. 2750, then there is no escape from the conclusion that the drafters of the Constitution undid on August 9, 1787, what they so solemnly did on August 8, 1787.

Such "on again, off again, on again" tactics cannot and should not be ascribed to so solemn a document as the Constitution or to so able and intelligent men as the drafters of the Constitution.

Senator ERVIN. If I may interject at this point, without discommoding you, I would like to say that your observation there is corroborated in all respects by one of the Federalist papers written by Alexander Hamilton which was preserved. He stated in most emphatic language that the Federal Government has absolutely no power over the qualifications of voters and that its power was restricted to prescribing the times and places and the mode of holding elections.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. The word "manner" is certainly synonymous with "mode" or "procedure" and the decisions of the courts under the Enforcement Act of May 31, 1870, certainly show that the Supreme Court itself has always recognized that the power of Congress, under section

4, of article 1, is restricted to regulating the manner in which votes are to be cast, counted, returned and certified——

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And section 4 of article 1 confers no other powers on the Congress.

Mr. JOHNSON. I am not being facetious, but I merely point out to what an absurd point applied logic would take anyone who contends that these proposals are valid and constitutional in view of the printed word and plain and ordinary meaning of the English language.

Until the 17th amendment was adopted in 1913, Senators were elected or chosen by the legislature of each State under the provisions of article 1, section 3, clause 1. Article 1, section 4, clause 1, wherein the words "manner of holding elections" are used, has remained unchanged since the adoption of the Constitution.

Conclusive evidence of the soundness of my contention is the fact that a constitutional amendment was considered necessary and was enacted to change the method for the selection of Senators from being selected by the legislatures of the respective States to being elected by the people of the respective States.

When it was determined to cast aside the denial of the franchise because of sex, a constitutional amendment was selected instead of an act of Congress.

And now they come forward in this bill and want Congress to take action other than going by the proper route of amendment.

Senator ERVIN. And if the section 4, of article 1, could be construed to vest such powers in the Congress then, on the same taken, it would have vested in the Congress the power to prescribe the qualifications of the members of the State legislatures who, under the second article of the Constitution, were to appoint the electors?

Mr. JOHNSON. That is exactly right.

Senator ERVIN. The presidential and vice presidential electors?

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And that demonstrates, it seems to me, as well as can be demonstrated the absolute absurdity of the idea that section 4 of article 1, vested in the Congress any power to do anything with respect to the qualifications of voters.

Mr. JOHNSON. Yes, sir.

If Congress has the power to adopt S. 2750, then Congress has the power to determine who in each State is qualified to serve as a member of the most numerous branch of the State legislature.

If Congress has the power to pass S. 2750, it has the power to determine who shall vote in Mississippi for the members of the most numerous branch of the State legislature. I deny that Congress has any such power or right, and say that only the State and its people have such power.

After the adoption of the Constitution by the Constitutional Convention, it was submitted to the legislatures of the respective States for consideration. Much debate was had, pro and con, upon the adoption by the various States. During the course of the consideration of the Constitution by the States, Alexander Hamilton, John Jay, and James Madison wrote a collection of papers explaining the various provisions of the Constitution. These have been compiled into a book entitled "The Federalist." These men, each par-

ticipating in the Constitutional Convention, were in a position to know, and did know, what the various provisions of the Constitution meant. To sustain my position, I submit to the committee the following excerpts from several of the Federalist papers:

I quote from "The Federalist," No. 52, written by Hamilton or Madison:

To the People of the State of New York:

From the more general inquiries pursued in the four last papers, I pass on to a more particular examination of the several parts of the Government. I shall begin with the House of Representatives.

The first view to be taken of this part of the Government relates to the qualifications of the electors and the elected.

Those of the former are to be the same with those of the electors of the most numerous branch of the State legislature. The definition of the right of suffrage is very justly regarded as a fundamental article of republic government.

It was incumbent on the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the Federal Government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitution in such a manner as to abridge the rights secured to them by the Federal Constitution.

The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of 25 years; must have been 7 years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.

In "the Federalist", No. 57, written by Hamilton or Madison, we find thus:

To the People of the State of New York:

The third charge against the House of Representatives is that it will be taken from that class of citizens which will have least sympathy with the mass of the people, and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.

* * * * *

Who are to be the electors of the Federal representatives? Not the rich, more than the poor; nor the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

In "the Federalist", No. 60, Hamilton was explaining what was meant by time, place, and manner in article 1, section 4, clause 1, when he spoke of the Legislature in this paper, and in the following quo-

tation he was, of course, referring to the Federal Legislature—the Congress. Quoting from “the Federalist”, No. 60, we find:

The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

There are numerous cases from the Supreme Court of the United States and other Federal courts which squarely support the position I have taken in this presentation and which clearly and unequivocally hold that Congress is without power to prescribe the qualifications of electors in the States for the most numerous branch of the State legislature, and, therefore, without authority to prescribe the qualifications of electors of Congressmen, Senators, and Presidential electors. Thus, under these decisions, the basic provision of S. 2750 is unconstitutional and, therefore, null and void.

When the Mississippi literacy test required that every elector be able to read any section of the constitution of Mississippi, or be able to understand the same when read to him, or give a reasonable interpretation thereof, the question of whether such was a valid literacy test was presented to the Supreme Court of the United States in the case of *Williams v. Mississippi* (170 U.S. 213–225, 42 L. Ed. 1012), decided 1898. This case sustained not only the right of the State to impose the test but also the validity of the test. The Court held that the imposition of the test did not violate any provision or amendment to the Constitution.

Subsequently, the literacy test of the State of Mississippi was amended to require that each applicant to register, or elector, should be able to read and write any section of the constitution of Mississippi and give a reasonable interpretation thereof to the county registrar, and also that applicant demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; also, the applicant is required to, without assistance, fill out in his own handwriting an application to register to vote. This literacy test was challenged in the Federal district court in the case of *Darby v. Daniel* (168 F. Supp. 170 (1958)) as being in violation of the 14th and 15th amendments. The three-judge court which heard the case sustained the right of the State to require the test and the validity thereof. No appeal was taken from the decision of the three-judge district court. Pertinent portions of the opinion, with the court speaking through Justice Cameron, are:

(1) Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States. The Supreme Court has spoken on the subject in language as clear as it is decisive. Witness, for example, what it said in *Pope v. Williams* ((1904) 193 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 817).

“The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to

be exercised as the State may direct, and upon such terms as to it may seem proper. * * * The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett* (supra), such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution, already stated; * * *. The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. * * *

* * * The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the State legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." 193 U.S. at pages 632-634, 24 S.Ct. at page 575.

* * * In assaying the reasonableness of such requirements it is well to note that the provision of the Oklahoma constitution, which the Supreme Court found unexceptionable in *Guinn* supra (238 at p. 357, 35 S. Ct. at p. 928), required the applicant to both read and write, and that the Court rejected the grandfather clause only because it was not able to discover any reason for its arbitrary exemption of those possessing certain qualifications on a specified date except one which flew in the face of the 15th amendment (238 U.S. at pp. 364-365, 35 S. Ct. at p. 931). Such is not the case here. At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere, it is nothing but reasonable that the States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the Government of this country and of the States.

(b) Literacy tests for prospective voters have been in effect in this country for a century, and no case has been brought before us holding that the people of a State have placed themselves under too heavy a burden in setting the standards which will earn the right to vote, and none condemning a literacy test as such. * * * Plaintiffs concede that it is proper for Mississippi to enact reasonable literacy requirement for voting. That concession is bound to include the unquestioned concept that it is the States which have plenary and exclusive power to determine what is reasonable. See the language of the Supreme Court opinions in part I, supra. Plaintiff's idea that a literacy test may properly embrace one facet but not two (or two facets but not three) is without sanction of either law or reason. In *Trudeau v. Barnes*, 5 Cir., 65 F. 2d 563, certiorari denied 290 U.S. 659, 54 S. Ct. 74, 78 L. Ed. 571, the Fifth Circuit Court of Appeals approved Louisiana constitutional requirements embracing both reading and interpreting its constitution and that of the United States.

The latest case decided by the U.S. Supreme Court sustaining the validity of a State literacy test as a condition precedent to the right to register is *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 3 L. Ed. 2d 1072, decided June 8, 1959. This case arose in North Carolina and involved the validity of the North Carolina literacy test. Both the lower court and the U.S. Supreme Court sustained the right of the State to require the literacy test and the validity of the test. Lassiter, an applicant to register, refused to take the North Carolina literacy test which required that every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section. Sections 163-28.1, 163-28.2, and 163-28.3 provide adminis-

trative remedies for a person denied registration. Upon denial of registration because of Lassiter's failure to take the literacy test, she appealed to the county board of elections thence to the Superior Court of North Carolina, thence to the North Carolina Supreme Court and thence to the U.S. Supreme Court. The power of the State to require the literacy test and its validity was sustained at all stages. Plaintiff claimed that the literacy test violated the 14th, 15th, and 17th amendments to the Federal Constitution.

The Court held North Carolina had the right to require the literacy test, that in so doing the State violated no provision of the Constitution and that the test was fair and reasonable. The Court speaking through Justice Douglas says at page 50, et seq., of the U.S. Report and at page 1076, et seq., of the Law Edition Report as follows:

We come then to the question whether a State may consistently with the 14th and 17th amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn v. United States*, *supra* (238 U.S. at 366), disposed of the question in a few words, "no time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted."

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633, 48 L. Ed. 817, 822, 24 S. Ct. 573; *Mason v. Missouri*, 179 U.S. 328, 335, 45 L. Ed. 214, 220, 21 S. Ct. 125, absent of course the discrimination which the Constitution condemns.

Senator STENNIS. Mr. Chairman, may I interrupt just a moment?

Senator ERVIN. Senator Stennis.

Senator STENNIS. Mr. Chairman, I want to highly commend Governor Johnson for a very fine statement and argument in explanation of S. 2750. I have listened to almost all of it.

However, it is a few minutes to 4, at which time I am compelled to leave because of the demands of official appointments that I have and which I cannot postpone.

I am proud of his presentation here, Mr. Chairman, as a fellow Mississippian, and I know the chairman and the committee will be impressed with it.

I appreciate the fact that he could come up here.

Mr. JOHNSON. Thank you, Senator.

Senator ERVIN. As the Senator from Mississippi knows, I have necessarily been compelled to do a good deal of studying in this field and I have heard the statements made by all of the witnesses who have appeared before the subcommittee on these bills.

And I say this in all sincerity, that in my judgment it would be impossible for any American lawyer to prepare a finer statement than Governor Johnson has made and is making on this legislation.

Mr. JOHNSON. Thank you, Senator.

Senator STENNIS. Well, I thank you, too, for I am proud of the presentation he has made, and I am terribly sorry that I have to leave now, but both of you do understand the circumstances.

Senator ERVIN. And I would like to say this, and in doing so I am paraphrasing a statement made by Justice Sutherland, but the saddest epitaph which could be written for a nullified constitutional principle is that those who the majority benefit fail to extend a saving

hand while there is yet time, and, as far as Governor Johnson is concerned, he is certainly extending a saving hand.

I do not think there is anyone in this country who can refute the constitutional soundness of what he has had to say and is saying to this committee on these bills.

Senator STENNIS. I certainly agree. I am proud that he has impressed the chairman and the committee.

Please excuse me.

(At this point, Senator Stennis leaves the hearing room.)

Mr. JOHNSON. Shall I continue, Senator?

Senator ERVIN. Yes.

Mr. JOHNSON (reading):

Article 1, subsection 2 of the Constitution in its provision for the election of Members of the House of Representatives and the 17th amendment in its provision for the election of Senators provide that officials will be chosen "by the People." Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U.S. 651, 663-665; 28 L. Ed. 274, 278, 279, 4 S. Ct. 152; *Smith v. Allwright*, 321 U.S. 649, 661, 662; 88 L. Ed. 987, 995, 996; 64 S. Ct. 757, 151 ALR 1110). It is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed (see *United States v. Classic*, 313 U.S. 299, 315; 85 L. Ed. 1368, 1377; 61 S. Ct. 1031). While subsection 2 of the 14th amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of the right to vote, the right protected "refers to the right to vote as established by the laws and constitution of the State" (*McPherson v. Blacker*, 146 U.S. 1, 39; 36 L. Ed. 369, 878; 13 S. Ct. 3).

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347; 33 L. Ed. 637, 641, 642; 10 S. Ct. 299) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise (cf. *Franklin v. Harp*, 205 Ga. 779, 55 SE 2d, 221; app dismd 339 U.S. 946, 94 L. Ed. 1361, 70 S. Ct. 804). It was said last century in Massachusetts that a literacy test was designed to insure an "Independent and intelligent" exercise of the right of suffrage (*Stone v. Smith*, 159 Mass. 413, 414, 34 NE 521).

North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis v. Schnell*, 81 F. Supp. 872, affd, 336 U.S. 933; 93 L. Ed. 1093; 69 S. Ct. 749, the test was the citizen's ability to "understand and explain" an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language." That seems to us to be one fair way of determining whether a person is literate,

not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Affirmed.

The case of *Camacho v. Rogers, et al.*, 199 F. Supp. 155 (October 19, 1961), is squarely in point to sustain the constitutionality of a State-imposed literacy test in English—New York requires persons literate only in Spanish to be required to read and write English before they can register. This decision squarely negates not only a portion of the preamble of S. 2750, particularly subsection (c), but also sustains the unconstitutionality of the bill proper. Camacho was a person literate in Spanish only who sought to enjoin the enforcement of the New York literacy statute requiring a person to be able to read and write English before he could register. Plaintiff had several grounds upon which he predicated the charge of invalidity, but for the purpose of this presentation, I mention only his contentions that the New York statute violated the equal protection clause of the 14th amendment, the 15th amendment because plaintiff was denied the right to register because of his race, that he was entitled to register irrespective of his race, and that there was a pattern of denying Puerto Rican-American citizens the right to vote predicated on the 1957 Civil Rights Act, 42 U.S.C.A. 1971 (c) and (e). The Court sustained the validity of the requirement of the New York statute and denied there was any violation of said civil rights statute.

Pertinent portions of the Camacho opinion are as follows:

(8) This brings us then to the nub of this case, which is whether a State may adopt a requirement that in order for a citizen to be eligible to vote he must read and write the English language. The establishment of standards for voting has been recognized as within the power of the States and not subject to Federal supervision *Guinn v. U.S.* (1915, 238 U.S. 347, 366, 35 S. Ct. 926, 59 L. Ed. 1340), save as such legislation might contravene the 14th and 15th amendments *Breedlove v. Suttles* ((1937) 302 U.S. 277; 58 S. Ct. 205; 82 L. Ed. 252). States are free to establish standards of eligibility to vote which do not contravene a constitutional prohibition. The following State requirements have been held to be constitutionally valid if equally applied to all who reside within the State: absence of criminal conduct, *Davis v. Beason*, 1890, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637; residency within the State for a designated period, *Pope v. Williams*, 1904, 111 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 817; successful passing of a literacy test, *Lassiter v. Northampton Co. Board of Elections*, 1959, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072; *Trudeau v. Barnes*, 5 Cir., 1933, 65 F. 2d 563; *Guinn v. U.S.*, *supra*; payment of a poll tax, *Breedlove v. Suttles*, *supra*. * * *

(9) While this case discussed the provision in the North Carolina statute requiring literacy and ignored the further requirement that it be in the English language, the above quotation is just as apposite for a person literate in a foreign tongue. The plaintiff here is in no different position than children born in the United States and taken from the country at any early age who return after reaching their majority and are literate only in a tongue other than English.

Plaintiff's argument, if followed to its logical conclusion, would mean that these people, no matter what their foreign tongue may be, should be entitled to vote as long as they are literate in such foreign tongue.

The statute is not an unreasonable exercise of the powers of the State to provide requirements for exercising the elective franchise. It is not unreasonable to expect a voter not only to be conversant with the issues presented for determination in choosing between candidates for election, but also to understand the language used in connection with voting. For example, there are printed in English on the ballot synopses of proposed constitutional amend-

ments, titles of the offices to be filled, and directives as to the use of paper ballot or voting machines. Finally, what is more proper than that the voter be literate in the language used to conduct the business of government in his State.

It is because of this view of the issue presented that the testimony received on the hearing in this matter, while relevant to the issue, is immaterial to its determination.

The literacy requirement is applicable to all citizens of New York without regard to race, creed, color, or sex. No charge is made that the test is improperly given or its contents unfair.

Senator ERVIN. I would like to ask you this question: If you do not think that the situation of the Puerto Ricans in New York is not a fine illustration of the wisdom of the Founding Fathers in providing that the States should have the power to prescribe qualifications for voters?

Mr. JOHNSON. I certainly do.

Senator ERVIN. In other words, would not the Legislature of the State of New York have much more competence than the Congress of the United States to determine whether or not the fact that these Puerto Ricans speak the Spanish language rather than English qualifies them or disqualifies them for the intelligent exercise of the franchise?

Mr. JOHNSON. I think that is true. I certainly do.

I listened with a great deal of interest to the gentleman who preceded me here.

He had a very, very nice brief. It was nice.

But, in answer to that brief, I might say, in a matter of a couple of questions, particularly as pertained to his sixth-grade education in the schools, that, is it not true that many progressive schools particularly outside of the South now follow a policy of automatic promotion from one grade to another so that all pupils in a given age bracket will be in the same grade regardless of scholastic ability?

The second question: If this be the case, how can the completion of six grades in this kind of school be accepted as proof of anything other than that the pupil has enrolled in classes?

The literacy requirement is applicable to all citizens of New York without regard to race, creed, color, or sex. The test is equally and fairly applied to all who take it.

Plaintiff has not been denied the equal protection of the laws nor has he been deprived of his life, liberty, or property, in violation of the 14th amendment (*Lassiter v. Northampton Co. Board of Elections*, *supra*; *Trudeau v. Barnes*, *supra*).

Plaintiff has not directly raised in his pleading the question of the 15th amendment except in the sense that he states that "he is being denied the equal protection of the law guaranteed to him by the 14th amendment" because "he is being denied the right to vote because of his race, as a Puerto Rican of Spanish ancestry." However, in the brief submitted after hearing before this Court, he claims conflict between the statutory provisions of New York and the 15th amendment in their application to the Puerto Rican community of New York. He claims that "race" and "color" were not intended to have a narrow or technical connotation, but refer to any minority in the community. In the *Lassiter* case (360 U.S. 53, 79 S. Ct. 991) the Court said:

"Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot.

"Because the plaintiff is unable to vote as a result of his inability to pass the test, it does not follow that the plaintiff is being discriminated against.

"The 15th amendment was not designed to protect against the claim of this plaintiff. He is not being denied the right to vote because of race, creed, or color, but because of his illiteracy in the English language."

Plaintiff places reliance on the Civil Rights Act of 1957 (42 U.S.C.A. 1971). Subdivision (a) of 1971 provides that—

"All citizens * * * who are otherwise qualified by law to vote at any election by the people in any State * * * shall be entitled * * * to vote at all such elections, without distinction of race, color or previous condition of servitude."

This is merely a restatement of the 15th amendment except that it adds the words "who are otherwise qualified by law to vote." The added words serve as a limitation insofar as the plaintiff is concerned. The requirement of literacy in the English language is a proper exercise of State power; the plaintiff is therefore not qualified under the laws of New York and this subdivision is inapplicable to him.

Subdivision (b) is of no help to the plaintiff since it is directed at deliberate acts of intimidation, threats, and coercion, none of which are charged here.

The complaint is dismissed.

Case authority, in addition to that cited and the cases referred to therein, could be cited to sustain my position but such would merely be cumulative and so, therefore, I will not unduly burden this committee with their citation.

I appreciate the courtesies which this committee has extended me and have enjoyed appearing before you.

I do believe that this Senate bill is unconstitutional, and I would like to say certainly, in answer to the Attorney General of this country who appeared here recently, that with the position he has taken with this bill, perhaps, and I mean it with deference, that he should be in the Peppermint Lounge in New York, teaching a new "twist," because for 15 months he has prevailed upon the Supreme Court of this country to usurp the powers of the country, or the Congress, and now he prevails upon Congress to usurp the interpretive powers of the U.S. Supreme Court.

Again, let me say that I appreciate the courtesies which this committee has extended to me, and I have enjoyed appearing before you very much.

I thank you, sir, for giving me permission to come before you.

Senator ERVIN. The committee is deeply grateful to you for coming before it and making this presentation, and the country ought to be grateful to you for your effort.

Mr. JOHNSON. I appreciate that, sir.

Senator ERVIN. That is, your effort to try to prevent one of the most obvious assaults upon the Constitution that has ever been proposed in the Congress.

Mr. JOHNSON. I believe that.

Senator ERVIN. Now, under article 3 of the Constitution, the judicial power of the United States is vested in the Supreme Court and such courts inferior thereto as Congress may from time to time establish.

And under the second section, if I am correct, the Federal judicial power extends to all controversies arising under the Constitution or the laws enacted by Congress pursuant thereto and the treaties made or which shall be made on behalf of the United States.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. Has it not been consistently held, throughout the history of the Nation, that any controversy which involves the determination or the meaning of the application of the constitutional principle presents a judicial problem rather than a legislative problem?

Mr. JOHNSON. Yes, sir. I find in the history of this country not one case acted upon by the Supreme Court or by any of the lower or inferior Federal courts, or any State court, which has held anything other than that the States of this Nation have the sole authority to set up qualifications for their voters, provided they did not interfere or discriminate against people because of race or color or previous condition of servitude.

Senator ERVIN. Is it not true that the 15th and the 19th amendments gave no new voting power to any American citizens and that the States still retain their power over the qualifications of voters, subject to only the limitations of those two amendments; first, that they could not deny or abridge the rights of a citizen of the United States to vote on account of race, color, of previous condition of servitude or on account of sex; second, no State may deny the right to vote to anyone on the basis of sex.

Mr. JOHNSON. That is true.

Senator ERVIN. Those are the two only changes that were made by those two amendments in respect to franchise, was it not?

Mr. JOHNSON. That is exactly right. Yes, sir.

It is hard to understand, Senator, how, for all these years, when these matters have come up, like women's suffrage and the changing of the method of selecting Senators for the U.S. Congress, that no one ever thought of anything else but the constitutional amendment route in order to do that.

This is the first time that I know of anywhere where they have attempted to completely usurp the prerogatives that were granted to the States by the Constitution of this country in 1787.

Senator ERVIN. The provision of section 2 of article 1 concerning the qualifications of persons eligible to vote for Members of the House of Representatives and it became effective as a part of the Constitution of the United States some 2 months before George Washington was inaugurated as the first President of the United States——

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And that has been in the Constitution for a period of some 172 or 173 years.

Yesterday the Attorney General of the United States was here before this subcommittee, and he admitted that, as far as he knew, there had never been any decision handed down by any court within that period of time holding or suggesting that Congress has the power to prescribe any qualifications for voters.

Mr. JOHNSON. And yet he said there was a national need for it.

Senator ERVIN. Yes. And he also said this yesterday, that if we were setting the qualifications for the individuals then he believes it would be unconstitutional and would require a constitutional amendment.

I wonder if you could tell me what these bills would do if they would not undertake to set the qualifications for voters?

Mr. JOHNSON. That is absolutely what they do.

Senator ERVIN. Do they not say——

Mr. JOHNSON. Completely.

Senator ERVIN. ——— in substance that none of the 50 States shall hereafter have the power to prescribe any literacy tests or tests of understanding or intelligence inconsistent with the Federal standards

which these bills would erect, namely the completion of the sixth grade in school?

Mr. JOHNSON. That is true.

Senator ERVIN. Now, I will ask you if you do not agree with me that these bills are unconstitutional under section 2 of article 1 of the Constitution and the 17th amendment as applied to the election of Senators and Representatives in Congress, because they attempt to usurp and exercise the power of the States to prescribe the qualifications of those who should vote for these officers?

Mr. JOHNSON. That is correct.

Senator ERVIN. I will ask you if you do not agree with me that the two which undertake to deal with State and local elections are not also unconstitutional on the ground that the States have the absolute power to prescribe the qualifications for those who are to vote for State and local officers, subject only to the limitations created by the 15th amendment, the 19th amendment, and such as may be created by the 14th amendment?

Mr. JOHNSON. That is certainly true.

Senator ERVIN. I will ask you if you do not agree with me that these bills are also unconstitutional in that they attempt to prescribe the qualifications for those who should vote for presidential and vice presidential electors in the face of the provision of the second Article of the Constitution, that such electors shall be appointed in such manner as the State legislatures may prescribe?

Mr. JOHNSON. That is true.

And in this preamble, and in these legislative findings, I cannot understand how they could expect anyone to believe that such conditions do exist.

In the *Macon County* case, which my friends spoke of a minute ago where the people in Alabama had been denied the right or that right, they actually came into court and could show no discrimination.

But the court said:

The court assumes that because there are so many colored people in this county, and so few who are qualified and who vote, that the court is going to take judicial notice of the fact that something is wrong.

Yet, in the State of Mississippi, the Civil Rights Commission, in its report, found nothing wrong from the standpoint of discrimination.

Senator ERVIN. It was that argument which induced me to ask Dean Griswold, of the Harvard Law School, what the percentage of the nonwhite students was in the law school, and I found that it was only about 2 percent, which is very far below the national nonwhite percentage of the population.

Mr. JOHNSON. Yes, sir.

I rode with a gentleman in a taxicab from National Airport last night who said, "I have been living in Maryland for 29 years and I have never cast a vote, never cast a ballot, never registered."

He was an intelligent person, but he was a man who did not understand the tremendous responsibilities that should be assumed by a first-class citizen of this country, if one wishes to be such.

Senator ERVIN. It is my understanding that President Eisenhower did not register and vote until after he was 60 years of age and, insofar as I have ever heard, nobody ever discriminated against him.

I think you and I have agreed that none of these bills can be sustained under the original Constitution or under the provisions of the 17th amendment, in that they attempt to prescribe the qualifications of voters when Congress has no power to take such action.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. I would like to ask you this: If the decisions of the courts, dealing with the enforcement of the 15th amendment do not state that legislation cannot be sustained as valid, under the 15th amendment, unless it is restricted and confined to voting discrimination by the United States or by a State or on account of race, color, or previous condition of servitude—has the Supreme Court not said that?

Mr. JOHNSON. They have said that clearly, concisely, and definitely, in every case that has ever come up.

Senator ERVIN. And there is not any reference whatever to race or to previous condition of servitude in the operative provision of the bill endorsed by the administration, is there?

Mr. JOHNSON. No, sir.

Senator ERVIN. It would apply to everybody in the field of literacy tests, regardless of whether there is any action at all taken on the basis of race, color, or previous condition of servitude. In other words, the operative portion of this bill is wholly immaterial to the provisions of the 15th amendment. The limitation of the 15th amendment is wholly irrelevant insofar as the applicability of the operative part of this bill is concerned?

Mr. JOHNSON. I would like to clarify another thing, Senator.

A lot of these people have a habit of reaching into the barrel and picking through things and picking out what they want.

The 25-percent vote cast in Mississippi, which this gentleman spoke of, was not in the Presidential election of 1960. It was in the general election of 1959 for Governor.

And in our State we only have the Democratic candidate, and it was a cinch that he would be elected without more than just one person going to the polls.

Therefore, that is the reason that a small number participated in our State.

Senator ERVIN. That is readily understandable to me. I was elected to Congress in a special election in 1946 in a very populous district of North Carolina. Only 1,700 people participated in the special election. I had no opposition and, normally, in that district they cast somewhere in the neighborhood of 100,000 votes or more.

Now, I will ask this: Would you agree with my interpretation of *United States v. Harris*, in the *Civil Rights Case*, of 1883, in this respect:

Do not those cases say that Congress has no power to take any action to enforce the 14th and 15th amendments unless the State has violated the 14th and 15th amendments?

Do not all of these bills violate that interpretation of the 14th and 15th amendments, and, therefore, constitute inappropriate legislation because they attempt immediately after being signed into law by the President, to apply to a sum of 43 States, which have not violated either one of those amendments through literacy tests they have or which they may adopt?

Mr. JOHNSON. Yes, sir. That is true.

Senator ERVIN. And has not the Supreme Court held in such cases, as the *Civil Rights Cases* of 1883 and the *Cruikshank* case, that the clauses of the 14th and 15th amendments, authorizing Congress to enforce the provisions of the amendments by appropriate legislation, do not authorize Congress to do anything except to enforce the prohibition against the State action and do not authorize the Congress to step in and perform the duty which these amendments clearly show is the duty of the State to perform?

Mr. JOHNSON. That is true, Senator.

Senator ERVIN. And so these bills attempt to enter a field of legislation which lies within the domain of the legislative power of the States?

Mr. JOHNSON. That is true.

Senator ERVIN. To make this very simple, in section 2 of article I, and in the 17th amendment it is stated in about as simple English as can be used, that Senators and Representatives in Congress shall be chosen by the people of the States which they represent.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. And then each of the States prescribe what people will do the choosing, and those people are the ones who have the qualifications requisite for electors of the most numerous branch of the State legislature.

Mr. JOHNSON. That is true.

Senator ERVIN. Do not these bills seek to nullify these provisions of the Constitution and, instead of saying that these electors shall have the qualifications requisite for electors of the most numerous branch of the State legislature, as these provisions say, these bills undertake to say that the electors shall be persons who have completed a sixth grade education in some public school of some State or the District of Columbia or Puerto Rico unless the State permits illiterates to vote, in which case illiterates will do the voting?

Mr. JOHNSON. That is true. That is true.

There was a gentleman who referred to himself as a "Preacher" who said that there are three mysteries in this life that he did not understand.

One is the bird on the wing. The other is the snake on the rock, and the third is the way of a man with a maid.

The fourth one that is a mystery to me is how some people in this country can be so anxious about the voting prospect of another, and at the same time are not cognizant that they are actually debasing the franchise or the privilege which they have themselves.

Senator ERVIN. When you really come down to it, there is nothing to be construed with respect to where the power lies that prescribes qualifications?

Mr. JOHNSON. If there is, I do not see it, sir.

Senator ERVIN. In the English language, used in section 2 of article I, and in the 17th amendment, it is just as clear and plain as it possibly can be?

Mr. JOHNSON. Yes, sir; as plain as it can be.

Senator ERVIN. And yet these bills undertake to say that the Constitution does not mean what it says, do they not?

Mr. JOHNSON. Yes, sir. Yes, sir. A good number of them are saying that.

But there are a great many people who have never read the *Federalist*; a great many people who have never taken the word of the people who were actually there and saw themselves, and they do not want to do it.

Senator ERVIN. Well, I think, perhaps, an antidote for bills of this nature would be for people to read the *Federalist* and read the Constitution and read the decisions of the Supreme Court construing these provisions, instead of reading political platforms.

Mr. JOHNSON. Yes, sir.

Senator ERVIN. Mr. Creech.

Mr. CREECH. Governor, the subcommittee has received, as you know, considerable testimony in the last couple of weeks on these three bills.

Mr. JOHNSON. Yes, sir.

Mr. CREECH. And several proponents of the bills have stated that although the Supreme Court has allowed literacy tests to remain, in the *Guinn* case and the *Lassiter* case, the Court has not passed upon the power of Congress to regulate literacy tests by finding that such tests are being used to discriminate.

These witnesses conclude that the cases are irrelevant, and that these bills can be sustained under the enforcement clauses of the 14th and 15th amendments.

I wonder, sir, if you would care——

Mr. JOHNSON. I do not believe that.

Mr. CREECH. I was just going to ask you if you would care to comment on this argument.

Mr. JOHNSON. No, I think the language is perfectly clear.

I think that people who want to find things irrelevant, particularly when they have no real legal basis upon which to base their beliefs, can always find it to be irrelevant because, after all, that is all that you can refer to for being irrelevant; there is nothing left. I do not see that this is true at all.

I think that if it had been the language of the Constitution, the Constitution would have been certainly different from what it is, and I think that this amendment, insofar as the discrimination clause is concerned, this 15th amendment, there are ample ways for the Justice Department of this country to see to it that the discrimination is minimized.

There is no bill that can be drawn, regardless of how it is drawn, where fraud cannot be perpetrated somewhere, and it is absolutely necessary that a State should have the authority, certainly, to have loose verbage in order that when they come up to register that this loose verbage will give sufficient leeway for a clerk to be able to intelligently determine whether a man is qualified or is not qualified.

Mr. CREECH. Governor, you have cited, of course, the *Lassiter* case, and it is one that has been discussed often during the course of the hearings.

In the *Lassiter* case the Supreme Court stated, and I am quoting from the case now:

While the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

Now, several witnesses have taken the position that this quotation indicates that Congress has constitutional authority to pass these bills.

What is your opinion on this assertion?

Mr. JOHNSON. I think that they are wrong. I do not think that Congress has the authority at all.

I do not think that there is any way for them to construe this discrimination amendment in any way in which Congress could be given the authority to set up standards for voter qualifications in these various States.

I do not know of any of these States which have any voter qualification laws that are unreasonable, not any of them. But you always are going to have people in public office once in a while who may discriminate and may not be fair, and it absolutely would not make sense for an intelligent person to be turned down and an ignorant person to be registered.

Those sort of instances are not hard to find, and if the Civil Rights Commission and the Justice Department of this country wish to stop it they have sufficient means of stopping it.

That is my opinion.

Mr. CREECH. And you feel, sir, that if the Justice Department were properly implementing the existing laws there would be no occasion or little occasion for this opportunity of discrimination that they say exists?

Mr. JOHNSON. I think that is true.

Mr. CREECH. I wonder, sir, would you care to address any further comments to the assertion again with regard to the *Lassiter* case, that Congress, acting pursuant to its constitutional powers and speaking here of the restrictions which Congress may impose other than those which are——

Mr. JOHNSON. I do not think that applies at all to such a thing as this bill or any of the portions of the bill that I set out or either of the other two bills.

I do not believe that that is what the court referred to at all in that.

Mr. CREECH. Sir, S. 2750, which is——

Mr. JOHNSON. How would they impose anything else?

Mr. CREECH. Well, this, of course, is not spelled out for us in the quotation.

The quotation merely says that——

while the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional standards, has imposed.

Mr. JOHNSON. I do not know. I cannot understand what they would mean by "imposing."

The word "discrimination" is sufficient in itself. There is no further need for any legislation to implement the 15th amendment or to define it particularly in such language as they use in this bill, to say, "deprivation of the right to vote."

That is strange language, and it is broad language and it leaves it up to them to determine for themselves what "deprivation of the right to vote" is.

Mr. CREECH. Sir, S. 2750, which is the administration bill, seems to rely for its constitutional basis upon article I, section 4. This bill is limited, of course, to Federal elections, and the Attorney General, in his statement, supported the bill under "the broad inherent power of Congress to govern the Federal elective process."

Would you care to comment on the extent of Congress' power to legislate voter qualifications under article I, section 4?

Mr. JOHNSON. I do not believe that Congress can, and I do not believe that there is any broad and inherent power other than that which was set out in the Constitution originally.

I know of no broad or inherent power for Congress to take off down the road after a matter of this type when the barrier was set up before Congress over 100 years ago.

Senator ERVIN. As a matter of fact, did not the Supreme Court of the United States hold, in the *Newberry* case, that Congress did not acquire any indefinite power under section 4 of article II except the power specifically given to it?

Mr. JOHNSON. That is right. That is in plain language..

Senator, I would like to have permission to insert this decision of the *Darby* case into the record.

Senator ERVIN. Yes; we will be delighted to have a copy of it.

Mr. JOHNSON. All right, sir. I brought a copy of that with me.

Senator ERVIN. It will be put in the record at this point in its entirety.

(The aforementioned document follows:)

**IN THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

H. D. DARBY

on behalf of himself and others
similarly situated,

Plaintiffs

v.

CIVIL ACTION

NO. 2748

JAMES DANIEL, Circuit Clerk of
Jefferson Davis County, Mississippi,
and **JOE T. PATTERSON**, Attorney
General of the State of Mississippi,
Defendants

Before **CAMERON**, Circuit Judge, and **MIZE** and **CLAYTON**, District Judges.

CAMERON, Circuit Judge:

The case before us, with some of the facts, is thus stated in plaintiff's brief: "This is an action for a declaratory judgment and injunction brought by plaintiff on behalf of himself and others similarly situated. The gravamen of plaintiff's complaint is that he and other Negro citizens of Jefferson Davis County, Mississippi have been denied the right to register in order that they might vote, solely because of their race and color, through the enforcement of a policy of discrimination against Negro Voters, the enforcement of unconstitutional voting requirements, and the discriminatory administration of valid requirements. The plaintiff also seeks to enjoin enforcement of a state statute which makes it a crime, punishable by imprisonment for one year, for him to accept financial and legal assistance in the prosecution of this action and for his attorneys and others to give such assistance."

"The plaintiff in this case is an adult Negro citizen of the United States and of the State of Mississippi, residing in Prentiss, Jefferson Davis County, Mississippi since 1947. He is not an idiot, an insane person, or an Indian who is not taxed, and is more than twenty-one years of age. His occupation is that of a minister of the Gospel. He has never been convicted of any crime enumerated in the Mississippi Constitution as grounds for disqualification as a voter. He has paid his poll tax for the years 1956 and 1957. He was a duly qualified and registered voter of Jefferson Davis

County prior to January 1, 1954, and exercised his right to vote in various elections held in the county between 1950 and 1955, having registered for the first time in the early part of 1950.

"In 1954 the Legislature of the State of Mississippi proposed that Section 244 of the Mississippi Constitution of 1890 be amended, and after the proposed amendment was ratified by a vote of the electorate, it became law in 1955." Defendant Daniel was and is Circuit Clerk and Registrar of Jefferson Davis County and will be referred to as defendant unless otherwise noted.

The qualifications of Electors are set forth in Article 12 of the Mississippi Constitution of 1890 as amended, titled "Franchise," and the article embraces Sections 240-253, inclusive.

The Sections of the Article, other than Section 244 which is challenged by plaintiff, grant the right to vote to inhabitants of the state, except idiots, insane persons and Indians not taxed, who are citizens of the United States, twenty-one years old or over, with certain residence requirements, who have duly registered as provided in the article and who have never been convicted of certain listed crimes and who have paid all poll taxes legally required of them before February 1st of the year in which they offer to vote. Section 249 provides: "And registration under the Constitution and laws of this State by the proper officers of this State is hereby declared to be an essential and necessary qualification to vote at any and all elections."

Section 244 of Article 12, prior to the amendment attacked, was in these words:

"§244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

Amended Section 244' reads as follows in its pertinent portions:

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1. In 1954 the Legislature of Mississippi proposed that Section 244 of the Constitution of 1890 be amended, and after the proposed amendment was ratified by a vote of the people it became a part of the Constitution in 1955.
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▼"Section 244. Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall

demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government."

Following the quoted language the amended section goes on to provide that a person applying to register shall make a sworn written application on a form to be prescribed by the State Board of Election Commissioners, and concludes with these words: "Any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954. The Legislature shall have the power to enforce the provisions of this section by appropriate legislation."

In February, 1956 the Board of Supervisors of Jefferson Davis County ordered a new registration and due notice thereof was given by publication as required by law. This new registration was in line with the practice which had been followed in the county for a number of years, new registrations having been had in the years 1906, 1923, 1934 and 1949.

Defendant Daniel first became Circuit Clerk and Registrar of Jefferson Davis County January 1, 1956. Without dispute and based upon his opinion that, since a new registration had been ordered and forms had been sent to him by the State Election Commissioners, he was so obligated, he began the practice of requiring all applicants, regardless of color, to take the examination provided by the amendment and covered by the questionnaire, which policy he pursued until about October 15, 1956. Plaintiff Darby first entered his office to register on June 29, 1956, and defendant Daniel handed him the questionnaire to be completed pursuant to the custom then universally followed by him. No discussion was had between plaintiff and defendant. Plaintiff completed a part of the written examination and signed his name and left.

He had consulted the attorney now representing him and had written a letter of complaint to the President of the United States some weeks before that, which resulted in an investigation of defendant Daniel being made by the Federal Bureau of Investigation. About October 1, 1956 defendant Daniel received a letter from the United States Attorney in Jackson, Mississippi requesting that Daniel come to his office for conference. He responded to the request, going in company with the county attorney to the office of the United States Attorney. There he was advised that the Department of Justice took the position that persons who, like plaintiff Darby, had been registered prior to January 1, 1954 were required to take only the oral examination covering the qualifications as set forth in the original Section

244 of Article 12 of the Mississippi Constitution. Daniel left the United States Attorney and went to the Attorney General of Mississippi, who advised him in writing October 12, 1956, that no person registered prior to January 1, 1954 was required to take the written examination provided by the amendment. Thereafter, Daniel pursued the policy of giving all applicants of Darby's class the option to take the oral examination provided by the original section or the written examination provided by the amendment.

About November 2, 1956 plaintiff Darby again presented himself for registration and was given the oral examination. He did not pass in the opinion of Daniel and was so advised. Neither Darby nor Daniel remembered what section of the Constitution Darby was called upon to interpret. About June 8, 1957, Darby came to Daniel's office again to register and was given the oral examination, and again failed to pass. A short time thereafter the F.B.I. made a further examination into Daniel's operation of his office in which Daniel explained freely what happened.

On June 22, 1957, plaintiff Darby again presented himself to defendant Daniel, this time requesting that he be given the written examination as provided by the amendment. Without dispute, plaintiff followed this course on the advice of his attorney, whom he had first consulted more than a year before. He was given the written examination on the forms furnished to Daniel by the state officials, and again Daniel ruled that he had not qualified for registration.'

2. After the Court had concluded the hearing of this action July 22-25, 1958, Rutha Dillon presented a "Motion to Intervene" served and filed September 16, 1958, setting forth that she had testified as a witness for plaintiff Darby and that her interest "may not be adequately represented by plaintiff and applicant may be bound by a judgment in this action." The application was filed by the attorneys already representing plaintiff Darby and with it was filed a memorandum brief in which she claimed that she was filing the application under Rule 20(a) and Rule 24(b) (2), F.R.C.P. Her application asked that she be permitted to intervene upon her testimony already given and upon the testimony introduced at the hearing. Her desire to intervene was grounded on her apprehension that plaintiff Darby might not represent her inasmuch as she had not registered prior to January 1, 1954, where as Darby had registered prior to that time and had requested and taken the written examination provided by the amendment to Section 244, although not required so to do.

The defendants resisted the requested intervention, taking the position that the application came too late and that plaintiff Darby, having volunteered to take an examination he was not required to take, was not in position to maintain the action brought by him. The amendment provides that Darby should not be "required" to submit to its terms, but contains no prohibition against his voluntarily doing so. Both he and defendant Daniel proceeded in the written examination before us in obedience to the terms of the amendment, and we do not pause to resolve this question, arising as it does after all of the briefs

have been submitted and much study given to the fundamental issues involved.

We see no harm to ensue from granting the application to intervene and have entered an order permitting the requested intervention upon the terms set forth. The intervenor will be referred to hereafter as a plaintiff.

Plaintiff Darby appealed, as provided by law, from the ruling of defendant Daniel rejecting his written application (he had not appealed from the other three rejections), and the evidence shows that in so doing he was guided by one of his attorneys of record who had been employed by the N.A.A.C.P. Legal Defense and Educational Fund. His attorney filed with the Registrar a writing bearing the heading "Appellant's Contentions." Plaintiff Darby and his attorney

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3. This document set forth that plaintiff Darby had appealed to the Board of Commissioners within five days from the refusal of Defendant Daniel to register him; that Section 244 of the Mississippi Constitution as amended "is unconstitutional and void on its face since it bestows upon the registrar of voters an uncontrolled discretion to determine who is able to interpret the Constitution of the State of Mississippi and who is able to demonstrate an understanding of the duties and obligations of citizenship in a democratic form of government," said allegation being applied also to the Mississippi statutes implementing the constitutional provision. The document further set up that the constitutional and statutory provisions "are unconstitutional and void because the purpose of said provisions was to enable the registrar of voters to discriminate against otherwise qualified Negroes, solely because of their race and color," and that said provisions were being administered by defendant Daniel "in such a manner as to discriminate against Reverend H. B. Darby and other Negroes otherwise qualified, solely because of their race and color." The document further contended that since plaintiff Darby had registered prior to January 1, 1954, the new provisions were not applicable to him.

appeared at the office of Daniel on October 7, 1957, but there was no meeting of the Commissioners scheduled or held at that time.' Said plaintiff and his attorney were advised that

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4. This appearance by plaintiff Darby and his attorney resulted, no doubt, from the language of Section 3226 of the Mississippi Code of 1942 providing that the Commissioners should meet "on the first Monday in October after appointment." The Commissioners had been appointed in 1956 and had held the October meeting that year. No provision being made in that section for meeting in any year except that of their appointment, the Mississippi Legislature in 1938 passed a statute appearing as Section 3240 of the Mississippi Code of 1942 providing that: "On the Tuesday after the third Monday in March, 1939, A.D. and every year thereafter the commissioners of election shall meet at the office of the registrar . . ." (Emphasis added.)

the Commissioners would meet at the Registrar's office on the Tuesday after the third Monday in March, 1958; plaintiff Darby testified that Daniel told them of a March meeting. No provision is made for notice to persons desiring

to present contests of the actions of the Registrar and we do not find that defendant Daniel made any agreement to give any notice to plaintiff or that such an agreement, if made, would have any legal effect. The appeal, apparently begun as a test of the provisions of the Constitution and Statutes here under attack, was not prosecuted, but this civil action was filed four days before the Election Commissioners met in Jefferson Davis County. The appeal is still pending before them.

Other portions of the testimony will be referred to under the discussion of the several points raised by the parties.

From the written contentions so filed on the appeal, the averments of the Complaint and plaintiff's brief it appears that the attack on the Mississippi Constitution and implementing statutes is based upon three grounds: that Section 244 is unconstitutional and void on its face because it bestows upon the Registrar "an uncontrolled discretion to determine who is able to interpret the Constitution of . . . Mississippi" and who is able to demonstrate an understanding of the duties of citizenship; that the section is unconstitutional and void because the purpose of said provisions was to enable the registrars to "discriminate against otherwise qualified Negroes;" and that said section is being administered "in such a manner as to discriminate against Reverend H. B. Darby and other Negroes otherwise qualified, solely because of their race and color."

The complaint specifies that the uncontrolled discretion referred to results from the amendment's vague and uncertain language "which fails to set up a standard of reasonableness capable of objective measurement." The precise prayer of the complaint asks an injunction "restraining defendant from enforcing those parts of said constitutional and statutory provisions which require an elector to give to defendant a 'reasonable interpretation' of a provision of the Constitution of the State of Mississippi and which require that an elector demonstrate to defendant a 'reasonable' understanding of the duties and obligations of citizens under a constitutional form of government." The allegations of unconstitutionality are predicated upon the due process clause of the Fourteenth Amendment and the provisions of the Fifteenth Amendment.

I.

(1) Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States. The Supreme Court has spoken on the subject in

language as clear as it is decisive. Witness, for example, what it said in *Pope v. Williams*, 1904, 193 U. S. 621:*

5. The Court was then composed of Chief Justice Fuller and Associate Justices Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes and Day, and the decision was unanimous.

"The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper . . .* The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, *supra* such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States. Some States permit women to vote; others refuse them that privilege. A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised *are matters for the States alone to prescribe*, subject to the conditions of the Federal Constitution, already stated; . . . *The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one . . .*

"... The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"*The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them.*" (pp. 632-634.) (Emphasis added.)

Like language was used by the Court in a case so much relied upon by plaintiffs, *Guinn et al v. United States*, 1915, 238 U. S. 347. In striking down the Grandfather Clause of the Oklahoma Constitution the Court fixed its eyes upon certain principles as the lodestar which should furnish the light by which it would be guided:

"... It [the United States] says state power to provide for suffrage is not disputed, although, of course, the au-

thority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a State to exert judgment and discretion in fixing the qualification of suffrage is advanced and no right to question the motive of the State in establishing a standard as to such subjects under such circumstances or to review or supervise the same is relied upon and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand the argument of the Government in substance says: No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision. (pp. 359-360.)

“Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.” (p. 362.) (Emphasis added.)*

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6. To the same effect see *In Re Slaughterhouse Cases*, 1873, 16 Wall. 36; *Minor v. Happersett*, 1874, 21 Wall. 162, 88 U. S. 162; *United States v. Cruikshank*, 1875, 92 U. S. 542; *United States v. Reece*, 1875, 92 U. S. 214; *State of Virginia v. Rives*, 1879, 100 U. S. 313; *Snowden v. Hughes*, 1944, 321 U. S. 1. And cf. *McPherson v. Blacker*, 1892, 146 U. S. 1, 35: “The question before us is not one of policy but of power . . .,” and Annotation 153 A.L.R. pp. 1066 et seq.
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(2) Plaintiffs base their argument that the constitutional provisions under attack are void on their face chiefly upon four Supreme Court decisions: *Yick Wo v. Hopkins, Sheriff*, 1886, 118 U. S. 356; *Guinn et al v. United States, supra*; *Lane v. Wilson*, 1939, 307 U. S. 268; and *Schnell et al v. Davis*, 1949, 336 U. S. 933. Analysis of those cases will reveal that they do not apply to the constitutional and statutory provisions before us.

Yick Wo involved the constitutionality, as administered by the Board of Supervisors, of an ordinance of the City and County of San Francisco making it unlawful to establish or maintain a laundry without the consent of the board of supervisors unless such laundry "be located in a building constructed either of brick or stone." Two Chinese Nationals were convicted of violating the ordinances and the two cases wherein they sought habeas corpus were consolidated and decided by the Supreme Court. One was Yick Wo's petition for habeas corpus denied by the Supreme Court of California, and the other a like petition by Wo Lee, on practically identical facts, denied by the Circuit Court of the United States for the San Francisco District. The facts in both cases were without dispute.

Of the 320 laundries in San Francisco, about 310 were constructed of wood, and about 240 were owned and conducted by subjects of China. The board of supervisors followed the policy of issuing permits for laundry operation to all Caucasians and of denying it to all Chinese even though in the cases presented to the court the premises of the Chinese had been inspected and approved by the fire wardens, the health officers, and other city officials. The Supreme Court of California thought that the statute was a proper exercise of the police power, and the United States Circuit Court, in the other case, thought otherwise, expressing the opinion that the ordinances as administered violated provisions of the Fourteenth Amendment and a treaty between the United States and China. In deference to the decision of the Supreme Court of California, however, and contrary to its own opinion, the Circuit Court discharged the habeas corpus writ as the Supreme Court of California had done.

The Supreme Court rejected the decision of the California Court, holding that the ordinances "seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." (pp. 366-367.) The final conclusion of the Supreme Court is epitomized in graphic words copied in the margin.⁷ The quotation

7. (pp. 373-374) "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

"The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, . . . No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. *The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. . .*" (Emphasis added.)

from the Supreme Court's opinion as applied to the facts there refutes the argument the case is called upon to furnish here. The case will be discussed further in our analysis of *Schnell, infra*. The Constitution and statutes of Mississippi do not contain any license for the exercise of arbitrary power. Plaintiffs are entitled to relief here if they can show the discrimination which was admitted there.

Guinn brought in question the constitutionality of the "Grandfather Clause" inserted by amendment into the Constitution of Oklahoma. That amendment established literacy tests, but exempted from such tests every person "who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, . . ." The exemption was made to apply also to the lineal descendants of such persons. The court held that the language of the Oklahoma amendment was indisputably aimed directly at the Fifteenth Amendment with palpable intent of destroying the effect of that Amendment. Its course of reasoning ran thus:

The Fifteenth Amendment provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Oklahoma Constitution fixed a date, January 1, 1866, as the crucial date, at which time the Fifteenth Amendment had not been passed and no Negro possessed the right of suffrage. By its terms, therefore, the exemption from the literacy test was denied to all Negroes, and was vouchsafed to all others. This being true, the Oklahoma amendment—and the Supreme Court so stated—could have no other purpose, under its very language, than to abridge the right of Negroes to vote by requiring them to pass a literacy test from which all non-Negroes were exempted.

Lane v. Wilson dealt with an Act of the Oklahoma Legislature passed at a special session immediately following the invalidation of the constitutional amendment in *Guinn*, which Act the Supreme Court decided was directed solely at a circumvention of the *Guinn* decision. The scope and reach of *Lane v. Wilson* can best be evaluated by quotations from the Supreme Court's opinion set forth in the margin.'

8. "Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. . . The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the 'grandfather clause' immunity prior to *Guinn v. United States*, supra, and citizens who were outside it, and the not more than twelve days as the normal period of registration for the theretofore proscribed class." (p. 271.)

"When in *Guinn v. United States*, supra, the Oklahoma 'grandfather clause' was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the federal Constitution. We are compelled to conclude, however reluctantly, that the legislation of 1916 partakes too much of the infirmity of the 'grandfather clause' to be able to survive. (p. 275)

"But this registration was held under the statute which was condemned in the *Guinn* case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizen whom the constitutional 'grandfather clause' had sheltered while subjecting colored citizens to a new burden." (p. 276) (Emphasis added.)

It is clear that the Supreme Court thought that it was impossible to construe the Oklahoma legislation as having any efficacy which did not perpetuate as a favored class the white citizens, who were the only ones permitted to vote in 1914," and to lay a heavy burden on Negroes aspiring to

9. In its decision of *Lane v. Wilson* the Circuit Court of Appeals for the Tenth Circuit, 98 F. 2d 980, 984, stated: "It may be, and we take it as true, that inasmuch as the so-called grandfather clause in the Constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915 no Negroes voted at the 1914 election . . ."

register under discriminatory requirements which they were forced to meet only because they had been wrongfully excluded from voting right under the unconstitutional provisions of the Grandfather Clause.

The last case relied upon by plaintiffs is the per curiam opinion of the Supreme Court in *Schnell et al v. Davis et al*, which reads as follows:

"The judgment is affirmed. *Lane v. Wilson*, 307 U. S. 268; *Yick Wo v. Hopkins*, 118 U. S. 356. Cf. *Williams v. Mississippi*, 170 U. S. 213. . ."

A three-judge District Court for the Southern District of Alabama had written a lengthy opinion and had based its

decision upon a number of grounds including a finding that the Boswell Amendment there under consideration "has, in fact, been arbitrarily used for the purpose of excluding Negro applicants for the franchise, while white applicants with comparable qualifications were being accepted."¹⁰ From

10. Fundamental factual differences differentiate *Schnell* from the case before us. The Alabama amendment invested the registrars with rigid and arbitrary powers, not requiring that their judgment be "reasonable." It contained no requirement that the examination be in writing or that a record be made of it so that it might be subjected to review. The decision makes no mention of any right of appeal from the decision of the registrars. State agencies took active leadership in campaigning for its adoption, stating openly in writing that the object of the amendment was to curtail Negro registration. As applied, the tests were not required of whites, only Negroes being subjected to them. Not one of these criticisms applies to the Mississippi amendment under the facts presented to us.

the concluding words of the District Court's opinion¹¹ it

11. 81 F. Supp. 881.

appears that the judgment it entered was to grant an injunction in favor of *Schnell et al.* The Supreme Court did nothing more than to affirm that judgment, not indicating which of the several grounds it adopted as the basis for the affirmation.

Viewed most favorably to the contentions of the plaintiffs here, it would be assumed that the Supreme Court decided that the Boswell Amendment placed final and arbitrary powers in the hands of the board of registrars, which power the board had in fact exercised arbitrarily in favor of white applicants and against Negro applicants. As shown above, this was the ground common to *Lane* and *Yick Wo*, the two cases forming the predicate for the Supreme Court's action in *Schnell*.

It is important to note that the Supreme Court, after citing these two cases, directed a comparison with *Williams v. Mississippi*, 1898, 170 U. S. 213. There, the literacy tests of the Mississippi Constitution of 1890 were upheld and, as demonstrated *infra*, the Court held categorically that the doctrine of *Yick Wo* did not apply. The clear meaning of the reference to the three cases by the Supreme Court was that in contrast with the valid requirements of the Mississippi Constitution, the Boswell Amendment involved in *Schnell* came under the condemnation of the two cases wherein the Supreme Court had pointed out specifically that arbitrary power granted and discriminatorily used could not stand the test of constitutionality.

II.

- (1) In considering whether amended Section 244 is unconstitutional on its face, it is important to bear in mind that

plaintiffs concede that the voting provisions of the Constitution of 1890 were valid. They could not, of course, do less because the Supreme Court of the United States specifically approved them in *Williams v. Mississippi*, 1898, 170 U. S. 213."

12. The Supreme Court there affirmed the decision of the Supreme Court of Mississippi in *Williams v. State*, 1896, 20 So. 1023, in which case a memorandum opinion only was written. That memorandum opinion referred to the decision of Chief Justice Cooper in the companion case of *Dixon v. State*, 20 So. 839; and consideration of the *Dixon* decision is necessary to an understanding of the effect of the Supreme Court's decision in *Williams*.

Sections 241, 242 and 244 of the Constitution of 1890 were attacked by motion (20 So. at 840) as being violative of the due process and equal protection clauses of the Fourteenth Amendment. The motion was grounded on the allegation that the constitutional convention of Mississippi was composed of 134 members, of which only one was a Negro; "that *the purpose and object of said constitution was to disqualify by reason of their color, race and previous condition of servitude, 190,000 Negro voters.*" It was contended before the Supreme Court, 170 U. S. at p. 215, that, "under prior laws, there were 190,000 colored voters and 69,000 white voters;" and "that Sections 241, 242 and 244 of the constitution of this state are in conflict with the Fourteenth Amendment to the constitution of the United States, because they vest in administrative officers the power to discriminate against citizens by reason of their color; and that the purpose of so investing such officers with such power was intended by the framers of the state constitution, to the end that it should be used to discriminate against the negroes of the state." (Emphasis added.) The contentions there made bear a marked resemblance to those now made before us. Responding to them the Supreme Court of Mississippi said (20 So. 840-841):

"At this point in the investigation it is sufficient to say that we have no power to investigate or decide upon the private, individual purposes of those who framed the constitution, the political or social complexion of the body of the convention . . . *We can deal only with the perfected work—the written constitution adopted and put in operation by the convention.* . . .

"We find nothing in the constitutional provisions challenged by the appellant which discriminate against any citizen by reason of his race, color, or previous conditions of servitude. . . . All these provisions, if fairly and impartially administered, apply with equal force to the individual white and negro citizen. It may be, and unquestionably is, true that, so administered, their operation

will be to exclude from the exercise of the elective franchise a greater proportionate number of colored than of white persons. *But this is not because one is white and the other is colored, but, because of superior advantages and circumstances possessed by the one race over the other, a greater number of the more fortunate race is found to possess the qualifications which the framers of the constitution deemed essential for the exercise of the elective franchise.*" (Emphasis added.)

Affirming the decision of the Mississippi Supreme Court in *Williams*, the Supreme Court of the United States considered at length *Yick Wo v. Hopkins*, *supra*, more than half of the opinion being devoted to a study of and quotations from that case. The Court quoted what it had said in *Yick Wo*, which quotation—set forth *supra*—is the portion of *Yick Wo* so vigorously urged by plaintiffs before us. But concerning said quoted language the Supreme Court of the United States, after stating "We do not think that this case is brought within the ruling in *Yick Wo v. Hopkins*," 170 U. S. at 225, said:

"This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

The Court, in that decision, quoted and discussed all of the important provisions of the Mississippi Constitution governing the right to vote, and also quoted the contention there made that the Constitution vested in the registrar "the full power, . . . to ask all sorts of vain, impertinent questions, and . . . reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the constitution with that power. Under section 244 it is left with the administrative officer to determine whether the applicant *reads, understands or interprets* the section of the constitution designated. The officer is the sole judge of the examination of the applicant, and even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration." (Emphasis supplied.)

It is of determinant significance that the Supreme Court in *Williams* rejected all of those contentions and upheld the constitutionality of Section 244 as originally written.

(2) It is pertinent to observe at this point that plaintiffs, having thus conceded the validity of the original 244, make the identical argument that amended 244 is unconstitutional because (a) its language is so vague and indefinite as to furnish no ascertainable standard of action, and (b) it invests the registrar with arbitrary and uncontrolled powers.

(a) The obvious answer to the ground first stated is that the words used in amended Section 244 are the identical terms used in the 1890 Constitution—"read," "reasonable," "interpret," "understand." Every one of those words was used in the original section which plaintiffs find no difficulty in comprehending. The language above quoted shows that the identical contention was made by Williams in his appeal and was rejected by the Supreme Court. It is further clear that the responsible state official was invested with exactly the same powers under the Constitution of 1890 that he has under the amended section.

It is plain that what plaintiffs complain of is, not that the words used in the amendment are vague and indefinite, but that the literacy test imposed by the amendment is slightly more onerous and exacting than that of the original. They complain that the amendment requires an applicant for registration to read *and* write a section of the Constitution. Certainly the original requirement was more rigorous at the time of its enactment than was the amendment when it was adopted.

The Constitution of 1890 was passed when Negroes had just emerged from complete illiteracy—cf. the Supreme Court's language in *Brown v. Board of Education*, 1954, 347 U. S. 483, 490 "Education of Negroes was almost non-existent and practically all of the race were illiterate"—and when both Negroes and whites had passed through two decades of the tragedy of Reconstruction when efforts at education were close to the vanishing point. After six decades of an increasingly competent educational system¹³ it seems moder-

13. Last year 268,246 Negroes attended the public schools of Mississippi and 281,684 whites. See Bulletin S.D. 58, Mississippi Department of Education.

ate indeed for the electorate to lay upon itself the obligation of being able to read and write the basic law of the Commonwealth. Understanding and interpretation formed a part of the original Section 244 and they seem all the more proper in this time of general enlightenment.

The same can well be said of the sentence added by the amendment requiring an applicant to demonstrate "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." In assaying the reasonableness of such requirements it is well to note that the provision of the Oklahoma Constitution, which the Supreme Court found unexceptionable in *Guinn supra* (238 U. S. at 357), required the applicant to both read and write, and that the Court rejected the grandfather clause only because it was not able to discover any reason for its arbitrary exemption of those possessing certain qualifications on a specified date except one which flew in the face of the

Fifteenth Amendment (238 U. S. at pp. 364-365). Such is not the case here. At a time when alien ideologies are making a steady and insidious assault upon constitutional government everywhere," it is nothing but reasonable that the

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14. Blazoned across the front of the October 3, 1958 issue of U. S. News & World Report are these words in red letters: "TODAY'S WAR—HOW THE REDS ARE OPERATING IN 72 COUNTRIES."
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States should be tightening their belts and seeking to assure that those carrying the responsibility of suffrage understand and appreciate the form and genius of the government of this country and of the States.

(b) Literacy tests for prospective voters have been in effect in this country for a century, and no case has been brought before us holding that the people of a state have placed themselves under too heavy a burden in setting the standards which will earn the right to vote, and none condemning a literacy test as such. In *Lassiter v. Taylor*, U.S. D.C. E.D. N. Car., 1957, 152 F. Supp. 295, 297-298, attention is called to the fact that nineteen states, only seven of which are Southern states, prescribe literacy tests, and those states and the laws prescribing the literacy tests are listed. Plaintiffs concede that it is proper for Mississippi to enact reasonable literacy requirements for voting. That concession is bound to include the unquestioned concept that it is the states which have plenary and exclusive power to determine what is reasonable. See the language of the Supreme Court opinions in Part I supra. Plaintiff's idea that a literacy test may properly embrace one facet but not two (or two facets but not three) is without sanction of either law or reason. In *Trudeau v. Barnes*, 65 F. 2d 563, certiorari denied 290 U. S. 659, the Fifth Circuit Court of Appeals approved Louisiana constitutional requirements embracing both reading and interpreting its Constitution and that of the United States.

(c) To attack the language of amended Section 244 as being too vague and indefinite is to ignore a long and unbroken line of decisions approving legislative enactments whose phraseologies are far more nebulous and difficult of ascertainment than the relatively simple terms before us. A few recent examples will suffice. The Supreme Court has recently "approved a federal and a state statute which made

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15. *Roth v. United States*, 1957, 354 U. S. 476.
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criminal the dissemination of literature which was "obscene, lewd, lascivious, filthy, indecent," although it was necessarily left to twelve laymen constituting the jury to determine whether such dissemination had "a substantial tendency to deprave or corrupt the readers by inciting lascivious thoughts or by arousing lustful desires." The Labor Board

is given power" to examine protracted negotiations between

16. *Labor Board v. Truitt Mfg. Co.*, 1956, 351 U. S. 149.

representatives of employers and employees and to determine therefrom whether there has been "bargaining in good faith."

In *Screws v. United States*, 325 U. S. 91, the Supreme Court upheld a criminal statute making it unlawful to deprive any inhabitant of a state "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . by reason of his color, or race." Those rights, privileges and immunities are legion and are being defined and expanded every day." The Court justified its

17. In *Adamson v. California*, 332 U. S. 46, it is demonstrated by the four exhaustive opinions that the Judges of the Supreme Court differ radically as to what the quoted words mean.

decision by holding that conviction under the statute can ensue only when the jurors find, under proper instructions, that the rights violated are rights belonging to federal citizenship as distinguished from those inhering in state citizenship. It should be remembered also that every juror in a criminal case is forced to apply his common sense in determining what is or is not a "reasonable" doubt; and jurors trying personal injury suits are required to fashion largely out of their own experience standards of "reasonable" care and "reasonable" prudence upon which to base their verdicts.

(3) To charge that the discretion vested in the Registrar is arbitrary and uncontrolled is to ignore the procedures provided by Mississippi law. Administrative appeal to a board selected by the State Board of Election Commissioners is given *de novo* and, on such appeal, the judgment of the Registrar is so highly tentative and lacking in finality that it is not even *prima facie* correct. In every instance his judgment must be one based upon reason, and absolute right of appeal to the courts is also provided. This administrative machinery has the explicit approval not only of *Williams, supra*, but of *Peay et al v. Cox, Registrar*, 5 Cir., 1951, certiorari denied 342 U. S. 896.

It would be hard to conceive of constitutional provisions which safeguard the rights of applicants for suffrage as well as do the ones under attack. A permanent record is made on forms prepared by state officers and applying uniformly to all applicants, so that anything smacking of discrimination can easily be checked by examination of the public records. This provides a more certain insurance against discrimination than the requirements of original Section 244—providing for oral examination—which bears the stamp of plaintiffs' approval. Right of appeal is given not only to rejected

applicants but to any member of the public who may think that any applicant has been too generously dealt with.

(4) (a) In an attempt to prove that the "purpose," i.e., motive, of the people of Mississippi in amending Section 244 of the Mississippi Constitution was an evil one, plaintiffs sought to introduce in evidence six photostatic copies of newspaper articles expressing the opinion that the object of the constitutional amendment was "aimed at stemming the tide of Negro voters that is growing up in the state."¹⁴

18. Five of these were assumed copies of one daily newspaper, including two excerpts from editorials, two news stories about the impending election, and one news story about the formation of a Citizens' Council in a Mississippi county. Each contained the expression of the opinion that the amendment was intended to limit Negro registration. This quotation from one of the editorials is typical:

"The second proposed amendment would tighten up the state's voter-registration requirements to curb registration of near-illiterates. . . . The proposed change is wise, desirable and very timely. . . . Adoption of this amendment, and fair and uniform application of the new voter-registration requirements, over the years would steadily raise the average educational qualifications and intelligence of our citizens. It would also curb the registration of members of groups most likely to engage in 'bloc voting' and we believe that adoption of this amendment would, over a long period, help win the fight to retain our separate school system and social institutions . . ."

The remaining newspaper article was a news story in another newspaper dealing largely with activities of Citizens' Councils.

The amendment was voted upon at an election for various officials, state and federal. No effort was made to prove that the copies offered were in fact copies of newspapers published at the time and no proof was offered to show that the statements attributed to various individuals were made, or that the opinions were actually expressed.

These articles were permitted to be inserted in the record for whatever value they might have towards proving what the plaintiffs called "climate." No statements were attributed to state officers and the articles purported to express only sentiments which were alleged to be entertained by the private citizens to whom they were attributed. The articles possessed little, if any, probative value.

(b) Plaintiffs also obtained by subpoena copy of an issue of the Clarion Ledger, a newspaper published in Jackson, Mississippi, containing an article by Charles M. Hills in which the number of Negroes supposedly qualified and registered in various counties of the state was discussed. The article showed that Jefferson Davis County had, in 1954, 1,221 registered Negro voters. Hills was offered by plaintiff as a witness and asked as to the correctness of his figures. He replied that he had no personal knowledge at all and no information except what he had obtained, as the article set

forth, from the Mississippi Citizens' Council. The figures could have been nothing but an estimate, as the registration records omit entirely any reference to the race of a registrant; but the article was received as a part of the record for whatever probative value it might have.

If the article should be accepted as dependable and as competent proof, some interesting comparisons might be made. In Jefferson Davis County 926 electors cast their ballots in favor of the constitutional amendment¹⁹ and 278

19. The figures are obtained from "Mississippi Official and Statistical Register, 1956-1960," page 397.

against it. Plaintiffs' newspaper article showed that fifty-four Negroes were registered voters in Itawamba County; in voting on the amendment, 228 citizens of that county voted for the amendment and 1248 voted against it. The article reflected that 4 Negroes were registered in Pontotoc County; the vote in that county was 339 for the amendment and 1371 against. Speculation engendered by the article would lead to the conclusion that the adoption of the amendment by well over a two to one majority statewide did not follow at all the pattern of race registration which plaintiffs attempt to ascribe to it.²⁰

20. Plaintiffs seek to draw an unfavorable inference against defendants from the fact that Governor Coleman declined to honor a subpoena issued by them. This was in keeping with the general law and the traditional policy of governors in Mississippi and in states generally. The Court offered to have Mr. Patterson, a member of the same Commission with the Governor, submitted to examination by plaintiffs, but plaintiffs did not choose so to proceed. It was clear that the testimony which plaintiffs sought to elicit from the Governor was hearsay and undependable because the figures were derived from a letter poll made of registrars which turned out to be incomplete. Plaintiffs had ample opportunity to attempt to make the desired proof by the Registrar of Jefferson Davis County in 1954, or to proceed by interrogatories, request for admission, or the other avenues provided in F.R.C.P., but they did not do so.

(c) Plaintiffs, pursuing further the argument that the "purpose" of amending Section 244 was to fashion tools the better to discriminate against Negro applicants, list a number of statutes passed by the Mississippi Legislature in 1954, 1955 and 1956 dealing with the public schools and with other aspects of what plaintiffs term "the state's declared policy of preserving segregation." If we should be tempted to accept "guilt by association" as a proper basis for condemning state action, it would not apply here, because the attack plaintiffs make here is basically upon a constitutional amendment enacted by vote of the people themselves. It was submitted at a time when only one other amendment was on the ballot and that had to do with a technical point applying to

corporate procedures. The argument, like those which precede it, is lacking in force.

(5) (a) Having failed to produce any tangible proof to sustain this position, plaintiffs finally call upon us to supply the lack by judicial notice. In other words, we are importuned to rule without proof that, on its face or by reason of its unrevealed sinister "purpose," the constitutional amendment is void. The showing before us wholly fails to warrant serious consideration of so condemning a whole people, which is what we would have to do if we accepted plaintiffs' argument. Neither proof nor judicial knowledge tend to sustain plaintiffs' position.

Even if we had such knowledge by some sort of occult power of divination, we would not have the competence to do what plaintiffs advocate. No case is cited as a precedent for such action, and no proof is offered to sustain it. If we should imagine ourselves possessed of such omniscience and omnipotence, we would find ourselves confronted by a vast array of authority which forbids questioning the motives even of a legislature, certainly of a sovereign people.

(b) Commenting upon the immunity of state legislators from having their motives scrutinized, Judge Learned Hand"

21. "The Bill of Rights," supra, p. 46.

exclaims: "but of all conceivable issues this would be the most completely 'political,' and no court would undertake it."²² He also quotes Chief Justice Taney's statement in "The

22. Citing *McCulloch v. Maryland*, 4 Wheat. 316, 423; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541; *Weber v. Freed*, 239 U. S. 325, 330; *Arizona v. California*, 283 U. S. 423, 435; *Daniel v. Family Insurance Co.*, 336 U. S. 220, 224.

License Cases," 5 How. 504, 583: "Upon that question the object and motive of the States are of no importance, and cannot influence the decision. It is a question of power." Mr. Justice Douglas, in *Fernandez v. Wiener*, 326 U. S. 340, quoted the language of Chief Justice Stone in *Sonzinsky v. United States*, 1937, 300 U. S. 506, 513: "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts." Upon a principle so unquestionable it is sufficient to add to the cases already cited a list of more recent decisions affirming it.²³

23. *Cohen et al v. Beneficial Industrial Loan Corp.*, 1949, 337 U. S. 541, 552; *Goesaert v. Cleary*, 1948, 335 U. S. 464, 467; *Oklahoma ex rel Phillips v. Atkinson*, 1940, 313 U. S. 508, 528; *United States v. Darby*, 1941, 312 U. S. 100, 115; *Child Labor Case*, 1922, 259 U. S. 20, 39; *Daniel v. Family Insurance Co.*, 336 U. S. 221; and *Doyle v. Continental Insurance Co.*, 94 U. S. 535.

We hold, therefore, that plaintiffs have wholly failed to establish that the amendment to Section 244 of the Mississippi Constitution of 1890 is void on its face or because it was the product of base motives. We hold, on the other hand, that said amendment and the statutes passed in connection with it are valid on their face and in fact, and are a legitimate exercise by the State of its sovereign right to prescribe and enforce the qualification of voters.

III.

(1) This brings us to the contention that plaintiffs, along with other Negroes, were actually discriminated against in the administration of the Constitution and laws of Mississippi by defendant Daniel. If such discrimination was practiced against plaintiffs, the actions of defendant would certainly come under the condemnation of the Fifteenth Amendment, or the Fourteenth Amendment, or both. Plaintiffs put on the witness stand a number of other Negroes, but we look first to their own testimony to determine if either plaintiff proved that he was qualified to register under the Constitution and laws of Mississippi and was denied registration because of his race.

Plaintiff Dillon, conceding that she was properly given the written test provided by the amendment, failed to produce a copy of that test for the Court's inspection. She did not demonstrate in her oral testimony the possession of the qualifications provided in the Mississippi Constitution and statutes, and there is no proof at all, therefore, that she had any status to maintain this action.

According to the testimony of his attorney, plaintiff Darby approached him in April or May, 1956, about the time he wrote President Eisenhower. The attorney called the N.A.A.C.P., which, sometime later, agreed that its Legal Fund would pay the attorneys and the expense of any litigation which might be brought by Reverend Darby.

This was before his first written application of June 29, 1956, in which he stated that he was a farmer. The application was signed by him but was not filled in. It is not claimed that, in this application or the oral tests which came after it, plaintiff Darby showed himself qualified to register. The entire case is predicated on the sworn written application of June 22, 1957, which he took under his attorney's advice and direction. This document, read in the light of the testimony of plaintiff Darby, reveals several deficiencies.

He made no answer to Question 14 inquiring if he had ever been convicted of the crimes enumerated in the question; considerable portions of the answers written by plaintiff are illegible. In response to Question 18 calling upon him to copy Section 123 of the Constitution of Mississippi," he wrote

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24. "The Governor shall see that the laws are faithfully executed."
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six lines not called for by the question and not possessing marked coherence. In giving his reasonable interpretation of that section he wrote, "the govenner govends all the works of the state and he is to see that all the voilatores be punished and als he can pardon out the penetenter ane pherson." In answering Question 20 which directed him to write his understanding of the duties and obligations of citizenship under a constitutional form of government, he wrote five lines which could hardly be called accurate or responsive to the question.²³

25. "a citizen is persn has in been in the USA all his days. and is not been convicted of enny crimes and has been Loyal. to his country and pase all his tax."
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That he could not write legibly is exemplified by examination of the several documents in the record written by him, and is further attested by the fact that the letter he sent the president was written entirely by someone else, including the signature. He did not attempt, while on the witness stand, to demonstrate that he could read. Every other Negro witness he placed on the stand was given a section of the Mississippi Constitution to read before the Court, but plaintiff himself did not attempt to show his ability to read. The evidence does not, therefore, support the burden imposed on the plaintiffs to show that they were qualified to be registered as voters. *A fortiori* it does not establish that defendant Daniel did not act in good faith or exercise a sound discretion when he made his decision that plaintiffs had not passed the examinations given them.

In passing judgment on this phase of the case we cannot leave out of view that defendant Daniel knew that he was under surveillance by federal officials and that he was dealing with one party who was acting under advice of counsel.

It is fundamental that plaintiffs must stand or fall on the merits of their own case. The Supreme Court stated the principle in *McCabe v. A.T.&S.F. Ry. Co.*, 1914, 235 U. S. 151, 162, in these words:

"But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to

others—which justifies judicial intervention.” (Citing a number of Supreme Court cases.”)

26. The cases on the subject are collected in an opinion by Chief Judge Hutcheson of the Court of Appeals of the Fifth Circuit in *Brown v. Board of Trustees*, 1951, 187 F. 2d 20, 25, where he quoted from several Supreme Court cases. This language is applicable to the case before us: “All of these considerations, however, are completely beside the mark here, for plaintiff has wholly failed to plead or prove any deprivation of his civil rights and it is elementary that he has no standing to sue for the deprivation of the civil rights of others.

“It is the individual who is entitled to the equal protection of the laws, and if he is denied . . . a facility or convenience . . . which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

“Cf. *Sweatt v. Painter*, 339 U. S. 629, 635, 70 S. Ct. 848, 851, where the court said: ‘It is fundamental that these cases concern rights which are personal and present . . . “petitioner’s right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, . . .”’”

(2) Plaintiffs served subpoenas on twenty-five Negro witnesses, of whom fifteen were placed upon the stand. Despite the principles last above quoted and such cases as *Reddix v. Lucky*, (5 Cir., 1958) 252 F. 2d 930, 938, holding that “obviously the right of each voter depends upon the action taken with respect to his own case,” we permitted this testimony to be introduced over objection to give plaintiffs a chance to show that there was a class whose rights they might carry if they established their own case, and also that the testimony might be considered as furnishing circumstantial evidence of discrimination in favor of the case of plaintiffs. Although some of the written applications exhibited in connection with the testimony of these witnesses were sufficient to raise an issue of fact as to their qualifications, it is not our province to set ourselves up as registrar of voters.

Some of the testimony certainly demonstrated the absence of qualifications of the applicants. For example, when called upon by Question 18 to copy Section 198 of the Mississippi Constitution, Johnnie B. Darby, plaintiff Darby’s wife, wrote: “I have so agreed to be as good a citizen as I possible can I have not yet read the Constitution of Mississippi I do try to abide by truth and right as the almighty god provide the understanding and wisdom.”

Another witness called upon to copy Section 16 of the Constitution” wrote: “Ex post facto laws or laws impairing

27. “Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.”

obligations contrace St. Shall Be passed.” Interpreting that section this same witness wrote: “a man must pay pold tax

befor he eagable to voat." This witness gave his occupation as that of teacher.

None of these witnesses took appeals from Daniel's ruling declining to permit them to register. Four of the fifteen passed the written examination, and of those who failed, the wives of two passed. He gave the test to some of the witnesses as many as four times and he invited plaintiff Dillon to come back and try again. The testimony of these witnesses adds little to the solution of the problem before us.

(3) Plaintiffs introduced one bound volume containing seventy-eight original applications. The documents do not show whether the applicants were white or colored. It seems probable that the purpose of introducing this volume was to show that, during this period, all applicants were required to take the written examination, whereas under the constitutional amendment those who were registered voters on January 1, 1954 were required to take only the oral test habitually given under the original Constitution. This does not prove anything which was not readily admitted by defendant Daniel. From the time Daniel came into office January 1, 1956, until the Attorney General of Mississippi advised him of his error, he had been using the forms furnished him by the State Election Commissioners and testing all applicants by written examination. As far as the testimony goes none had objected. The point of this testimony, however, is that undisputedly white and colored were treated exactly alike. Since, according to the undisputed proof, there were only forty to fifty Negro voters registered in the county, the seventy-eight applicants, all of whom passed, necessarily included some white people.

The wrongful interpretation or the misapplication of Mississippi law alone would not give this Court jurisdiction or amount to deprivation of any constitutional rights. Under this phase of the case discrimination alone resulting from the fact that plaintiffs are Negroes can justify maintaining the action or granting the relief sought. The Supreme Court announced the principle in explicit terms in *Snowden v. Hughes, et al*, 1944, 321 U. S. 1, 8, (a case in which *Williams v. Mississippi, supra*, was cited with approval) where the dismissal of an action for want of jurisdiction was approved where a candidate for office sought equitable relief against party officials who refused to certify him as a candidate. The language quoted in the margin controls here.²⁸

28. "But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. . . . And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. . . . But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 U. S. 519, 520; there must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago, 177 U. S. 183, 186; . . ." (Emphasis supplied.)

The essence of the action before us, therefore, is discrimination on the part of the defendant Daniel,—discrimination against plaintiffs, Negroes, and in favor of white persons. After listening to the oral testimony and examining the documents carefully we are unable to find any tangible or credible proof of discrimination. There is no proof that any white person was ever treated in any manner more favorably than plaintiffs or any other Negroes. The mere showing that of 3,000 qualified voters in Jefferson Davis County, only forty to fifty are Negroes is not sufficient. Plaintiffs carry the burden of showing that plaintiffs have been denied the right to register because they are Negroes, and that white people similarly situated have been permitted to register. This record contains no such proof. The disparity between numbers of registrants, as has been so often pointed out, results doubtless from the fact that one race had a start of several centuries over the other in the slow and laborious struggle toward literacy. This record does not, in our opinion, show that defendant has practiced discrimination. From our observation of his demeanor during the trial and while on the witness stand and of the evidence generally we are convinced that he has shown himself to be a conscientious, patient and fair public official, exerting every effort to do a hard job in an honorable way.

IV.

Plaintiffs aver in their complaint that they have a right to maintain this action without exhaustion of the administrative remedies provided under Mississippi law. They base this contention upon the provisions of 42 U. S. Code Annotated, § 1971 (d), upon their charge that "where the plaintiff challenges the constitutionality of a state statute or policy, a federal court will not require the exhaustion of administrative remedies;" and upon their assertion that "plaintiff here seasonably attempted to exhaust his administrative remedies and was unable to obtain a decision by the Board of Election Commissioner." These contentions will be discussed in reverse order.

(1) Mississippi's election machinery is under the supervision of the State Board of Election Commissioners consisting of the Governor, the Secretary of State and the Attorney General." This Board is required," "Two months

29. Mississippi Code of 1942, § 3204.

30. *Ib.* § 3205.

before every general election of representatives in Congress, and of electors of president and vice-president of the United States, [to] appoint the commissioners of election for each county" The absolute right of appeal to the county board is given in words reproduced in the margin.³¹ Hearings

31. *Ib.* § 3224 provides that: "Any person denied the right to register as a voter may appeal from the decision of the registrar to the board of election commissioners by filing with the registrar, on the same day of such denial or within five days thereafter, a written application for appeal."

§ 3225 provides: "Any elector of the county may likewise appeal from the decision of the registrar allowing any other person to be registered as a voter; but before the same can be heard, the party appealing shall give notice to the person whose registration is appealed from, in writing, stating the grounds of the appeal; which notice shall be served by the sheriff . . ."

on appeal are provided for by § 3227 of the Mississippi Code (appearing first in the Mississippi Code of 1892) entitled "Appeal Heard De Novo:"

"All cases on appeals shall be heard by the boards of election commissioners de novo, and oral evidence may be heard by them; and they are authorized to administer oaths to witnesses before them; and they have power to subpoena witnesses, and to compel their attendance; to send for persons and papers; to require the sheriff and constables to attend them and to execute their process. The decisions of the commissioners in all cases shall be final as to questions of fact, but as to matters of law they may be revised by the circuit and Supreme Courts. The registrar shall obey the orders of the commissioners in directing a person to be registered, or a name to be stricken from the registration books."

Sections 3228, 3229, 3230 and 3231 provide for hearing of the appeal by the circuit court of the county. The right of appeal to the Supreme Court is given.

The evidence does not show that plaintiff Darby "was unable to obtain a decision by the Board of Election Commissioner." It does show that he seasonably appealed to the County Board of Election Commissioners, thus electing to proceed by statutory appellate procedures, but that he failed to follow them through. On the other hand, he began this civil action four days before the first meeting of the Board held after his appeal. The appeal is still pending and undisposed of." Plaintiffs' first assigned reason is, therefore, without merit.

32. Meetings of the Board are fixed by three Mississippi Statutes: Section 3239 of the Mississippi Code of 1942, first passed in

1880, provides for a meeting "On the first Monday of October preceding a general election, and five days before any other . . ." There was no general or other election in Mississippi during 1957. Section 3226 first passed in 1892, provides for meetings on the first Monday in October after appointment. The reason for this statute is that the time of appointment of the Board is indefinite under Section 3205, *supra*. The Board had been appointed in 1956 and had held a meeting in October of that year. This statute does not apply to any year except the year of their appointment.

The Mississippi Legislature of 1938 passed a new statute, now Section 3240 of the Code, requiring that the Board meet every year on the Tuesday after the third Monday in March, and this is the general meeting. The statutes provide an understandable and reasonable time for the meeting of the Board so that an elector desiring to register may not miss any election, and plaintiff and his attorney were advised by the statutes and by word of the Registrar of the date the Board would meet. Instead of attending the meeting of the Board and prosecuting the appeal they had begun, they filed this civil action.

Plaintiff Rutha Dillon testified that she did not appeal at all.

(2) The cases cited by plaintiffs" do not sustain their

33. E.g., *Gibson v. Board of Public Instruction of Dade County*, 5 Cir., 1957, 246 F. 2d 913, which holds premature the contention that school children did not pursue administrative remedies where the Florida Constitution made nonsegregated schools illegal.
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contention that it is not necessary to exhaust administrative remedies where the claim is asserted that constitutional rights have been violated.

There are decisions" holding that, where an appeal presents

34. E.g., *Bruce et al v. Stilwell et al*, 5 Cir., 1953, 206 F. 2d 554.
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only matters of law, the court may intervene without awaiting action by the intermediate administrative board which had no power to pass upon legal questions. But such cases do not control here. The written appeal of plaintiff Darby on June 24, 1957 was a general appeal, and the writing which accompanied it, states that he had on June 22, 1957 presented himself to the Registrar, making application to register as a voter "whereupon such instance notwithstanding that I did then and do now possess the necessary qualifications to register, I was denied registration." A letter from his attorney dated September 21, 1957 states that "He has been denied the right to register to vote, notwithstanding that he was then and is now possessed with the necessary qualifications for same." The formal "Contentions" filed by said plaintiff October 7, 1957 raised constitutional questions, but also reiterated the questions of fact theretofore relied upon, to-wit: that defendant Daniel was administering the constitutional and statutory provisions of Mississippi in such a manner as to discriminate against him, and that he was a duly qualified and registered voter in Mississippi prior to

January 1, 1954, and was entitled to registration without complying with the additional qualifications contained in the amendment to the Constitution. In this state of the record and under the complaint, it is clear that plaintiffs' challenge did not relate to questions of law only. We repeat what the Court of Appeals for the Fifth Circuit said in *Peay v. Cox, supra*:" "The Commissioners are sworn officers and

35. 1951, 190 F. 2d 123, 126, certiorari denied 342 U. S. 896.

presumably will give them a fair hearing. They may easily think the petitioners are right in their construction of the Mississippi Constitution . . . If they hold otherwise on that point but that a discrimination is practiced, they may correct that. The Registrar is bound to obey them." The second ground asserted by plaintiffs is, therefore, untenable.

(3) Finally, plaintiffs claim to be exempted from Mississippi procedural laws relating to registration and appeal therefrom, basing their contention upon the Act of Congress approved September 9, 1957, Public Law 85-315, Part IV, Section 131 (d)." Plaintiffs would construe the words "shall

36. The section now codified as 42 U.S.C.A. § 1971 (d) reads as follows: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added.)

have exhausted any administrative or other remedies that may be provided by law" as permitting interception of the state remedy of appeal already begun and carried through by Darby to a point just short of hearing before the County Commissioners; and as relieving plaintiff Dillon of having taken the first step towards appeal, or having made any move at all until more than two years after her application had been rejected by the Registrar.

The mechanics set up by Mississippi to determine which applicants are qualified to register embrace three steps: Written application, which is passed upon by the Registrar; appeal from his ruling by the applicant or any other citizen and full hearing before the County Board; and appeal to the Circuit Court of the county. The Court of Appeals for the Fifth Circuit, in *Peay v. Cox, Registrar*, 190 F. 2d at p. 126, certiorari denied 342 U. S. 896, classified even the step carrying the controversy before the courts as administrative under the authority of *Federal Railroad Commission v. General Electric Co.*, 281 U. S. 464. To short-circuit the admittedly administrative proceedings short of a hearing and decision by the County Board would be not only to deny exhaustion of administrative remedies, but to stop them before they had begun. Such a conclusion is compelled if

two key words of the new federal statute, "remedy" and "exhaust," are given their normal meaning.

"Exhaust" means to use up, to expend completely. "Remedy" is defined as "something that corrects, counteracts or

37. Webster's New World Dictionary, p. 509.

38. *Ib.* p. 1230.

removes an evil or wrong; relief; redress." To sustain plaintiffs' position would be to shut off all state action aimed at providing a remedy, at redress. But the words of the statute contemplate that the state be given a chance to "correct" the asserted "wrong." It is difficult to perceive how these words of the statute can be given any efficacy at all or how the constitutional scheme can be fulfilled if federal competence is to be construed as displacing state power in this vital field before the state is permitted to take the first step towards furnishing an administrative "remedy."

The meaning of the quoted words must be determined in the light of state and federal competence as established by the Constitution as construed by the Supreme Court. In balancing the rights of a plaintiff to the protection of the Constitution and the power of a state over suffrage, it is well to keep in mind what the Supreme Court said in *Guinn, supra*, to the effect that "without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rests would be without support and both the authority of the nation and state would fall to the ground." The state of Mississippi had plenary and exclusive power to fix the qualifications of voters. More than that, it had and must have the power to provide machinery for its enforcement. The machinery provided by it contemplates the relatively ministerial act of registration by the registrar. The heart of Mississippi's machinery lies in the right of any person to appeal to the County Election Commission. That body alone has the power to have a hearing, to consider evidence, to give the time and study incident to a considered conclusion. Its findings and orders are absolutely binding upon the registrar. To take from this administrative scheme the duties conferred on this Board would be to render sterile the undoubted exclusive power of a state over suffrage.

The Supreme Court of the United States has throughout its history recognized the rule that administrative proceedings must be exhausted, and it has been particularly punctilious in requiring the exhaustion of administrative remedies provided by the states.

We are confronted here with the necessity of deciding the point at which a federal court would be warranted in interrupting administrative procedures,—that is, what the statute

under consideration means by exhaustion of administrative remedies. The Supreme Court, in handling an action for declaratory judgment in a district court under the Rehegotation Acts, used this language concerning administrative remedies, affirming the act of the district court in declining jurisdiction:³⁹ "Ordinarily, of course, issues relating to ex-

39. *Aircraft & Diesel Corp. v. Hirsch*, 1947, 331 U. S. 752, 764 and 767; and cf. *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274; *United States v. Sing Tuck*, 194 U. S. 161; and *Gonzales v. French*, 164 U. S. 338.

haustion of administrative remedies, as a condition precedent to securing judicial relief, and to the existence of jurisdiction in equity are either separate or separable matters, to be treated as entirely or substantially distinct. The one generally speaking is simply a condition to be performed prior to invoking an exercise of jurisdiction by the courts. The other goes to the existence of judicial power in the basic jurisdictional sense . . .

" . . . The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them; that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

The solicitude habitually manifested by the Supreme Court in its traditional dealing with state matters before administrative agencies is well illustrated by the language used in *Alabama Public Service Commission et al v. Southern Railway Company*, 1951, 341 U. S. 341, 349-350: "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '(f)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts."

And in *Hecht Co. v. Bowles*, 1944, 321 U. S. 321, 329-330, the Court upheld the refusal of a District Court to grant an injunction using this language: "We cannot but think that if Congress had intended to make such a drastic departure

from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

"... We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied ...

"... Neither body [that is, administrative and court] should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, ..."

It seems reasonable that, as applied to the Mississippi statutes under the facts of this case, the exhaustion of administrative remedies provided in the quoted federal statute should, in any event, be held to exist only after the appellate proceedings before the County Election Commissioners have been completed. Such a course would give full protection to the rights of plaintiffs, affording them remedy in the federal courts at the point where the administrative process is by Mississippi statutes committed to the courts. That is consistent with the holding of the Supreme Court in *Lane v. Wilson, supra*:⁴⁰ "To vindicate his present grievance

40. 307 U. S. at 274.

the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had ... But the state procedure open for one in the plaintiff's situation ... has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies ... Barring only exceptional circumstances, ... resort to a federal court may be had without first exhausting the judicial remedies of state courts." The exercise of such a discretion comports with the holdings of a long line of decisions of the Supreme Court."

41. *Burford et al v. Sun Oil Co. et al*, 1943, 319 U. S. 315; *Railroad Commission of Texas v. Pullman Co.*, 1941, 312 U. S. 496; *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Prentis et al v. Atlantic Coast Line Co. etc.* 1908, 211 U. S. 210, and cases cited. And see also *Peay v. Cox, supra*; *Cook v. Davis*, 5 Cir., 178 F. 2d 595; and *Bates v. Batte*, 5 Cir., 187 F. 2d 142.

And compare the language and action in *Lane, supra*, with that in *Alabama Public Service Commission, supra*.

We think the foregoing reasoning is sound, but we do not have to rest this phase of the decision upon it because it is quite clear that this case is not governed by the quoted provisions of the Act of September 9, 1957. By its terms it

applies only to "proceedings instituted pursuant to this section." Subsection (d) appears as a part of the Civil Rights Act of 1957 bearing the heading: "Sec. 131." That section creates procedures theretofore unknown and vests the Attorney General of the United States with power to institute legal proceedings for private individuals. It is manifest that Subsection (d) applies only to actions so instituted. It follows that plaintiffs cannot maintain this action for the additional reason that they failed to pursue the reasonable and adequate administrative remedies provided by Mississippi law.

V.

Plaintiffs attack the constitutionality of the Mississippi statutes covering champerty and maintenance, Section 2049-01 through Section 2049-08 of the Mississippi Code of 1942, this portion of the action being directed chiefly against defendant Patterson, Attorney General of Mississippi. The complaint alleges that the defendant Attorney General threatens to enforce as against the plaintiffs and their attorneys the provisions of these statutes and that, as the result of said threats, plaintiffs and their attorneys are suffering irreparable injury. Plaintiffs' evidence wholly failed to sustain these charges of the complaint. In fact, that evidence showed without dispute that no such threats had been made and that no action was taken or within contemplation which could in any way affect the welfare or the rights of plaintiffs or their attorneys. The statutes have not been passed upon by the courts of Mississippi. Since the evidence fails to establish that any controversy exists between plaintiffs and either defendant with respect to said statutes, and in view of the long line of Supreme Court decisions committing such matters at least primarily to state court action, *Amalgamated Clothing Workers of America v. Richmond Bros.*, 348 U. S. 511; *Stefanelli v. Minard*, 342 U. S. 117; *Douglass v. City of Jeanette*, 319 U. S. 157; and *Watson v. Buck*, 313 U. S. 387, and cf. 28 U.S.C.A. #2283, plaintiffs cannot maintain this phase of their complaint.

It results from the foregoing views that plaintiffs are not entitled to any of the relief sought. We are, therefore, entering an order dismissing the complaint.

DISMISSED.

(This Opinion issued November 6th, 1958.)

Mr. CREECH. Sir, several, or, at least one of the proponents of these bills has stated to the subcommittee that the 13th amendment, section 5 of the 14th amendment, and section 2 of the 15th amendment, are sufficient constitutional authority for Congress to enact these measures.

Would you care to comment on this statement?

Mr. JOHNSON. I do not believe that they can find, anywhere in the Constitution or in any of the amendments to the Constitution of the United States, sufficient authority to place this matter before Congress.

I cannot understand their thinking when the language is perfectly clear. If it did not give Congress the right, there is no way that they can reach out and pull in something that is nothing to begin with.

All of these things are things of the spirit, so to speak, as far as they are concerned. I do not believe that anyone who has had any experience whatsoever with any constitutional cases of this country could assume that there was any such authority given.

You might find it among, maybe, a few law professors, who deal in theory altogether, in this country.

I am sure you could find it there.

Senator ERVIN. I have been trying to solve in my own mind how anyone can give an interpretation under section 2, article 1, and the 17th amendment, other than the plain meaning of the words used there.

And I have come to the conclusion that man tries to attribute to some language a meaning wholly incompatible with such language, and no matter how sincere he may be, he is engaging in the art of complicating simplicity and he winds up in a confused mental state.

With reference to the contention that the *Lassiter* case, the *Williams* case, the *Guinn* case, and the *Trudeau* case, are irrelevant to this question, the only question involved in those cases is whether the States had the power—

Mr. JOHNSON. Yes, sir.

Senator ERVIN (continuing). To prescribe literacy tests and whether such literacy tests violated the 14th and the 15th amendments.

That was the only question that was before the Court.

Mr. JOHNSON. That is true.

Senator ERVIN. So, therefore—

Mr. JOHNSON. There are none that are so blind as those who refuse to see, and—

Senator ERVIN. Yes. In other words, the argument is based upon the theory that in some strange way cases which are decisive of the very matter that is involved in this legislation are irrelevant to this legislation.

Mr. JOHNSON. Yes, sir. I think absolutely that that is alone the original explanation of the Constitution and its adoption and, in addition to that, these various cases like *Trudeau* and the *Northampton* case, the *Lassiter* case, the *Camacho* case, those are the only things that are relevant and the only things that you can tie to in this country, if you are going to adhere to precedents that have not only been adopted but have been sustained time and time and time again.

Senator ERVIN. Excuse me, I have to go to the Senate. Mr. Waters, do you have any questions?

Mr. WATERS. I have none.

Senator ERVIN. Governor, it certainly has been a privilege to have you with us.

Mr. JOHNSON. Thank you, Senator. It has been a pleasure to be up here, and I want to thank you.

Senator ERVIN. Your paper and the statements you made should clear out the cobwebs of some legalistic minds.

Mr. CREECH. Sir, since Mr. Waters has no questions shall we recess until tomorrow?

Senator ERVIN. We will recess until 10 o'clock tomorrow morning. (Whereupon, at 4:50 p.m., a recess was had until 10 a.m., Thursday, April 12, 1962.)

LITERACY TESTS AND VOTER REQUIREMENTS IN FEDERAL AND STATE ELECTIONS

THURSDAY, APRIL 12, 1962

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 457, Old Senate Office Building, Senator Sam J. Ervin, Jr. (chairman of the subcommittee) presiding.

Present: Senators Ervin and Keating.

Also present: William A. Creech, chief counsel and staff director; and Bernard J. Waters, minority counsel.

Senator ERVIN. The subcommittee will come to order.

I believe we agreed to let Mr. Rauh testify first this morning. I believe the witness we had before him yesterday had a 38-page statement, which was a very able statement, but which took considerable time to present.

STATEMENT OF JOSEPH L. RAUH, JR., VICE CHAIRMAN FOR CIVIL RIGHTS AND CIVIL LIBERTIES OF AMERICANS FOR DEMOCRATIC ACTION

Mr. RAUH. Mr. Chairman, my name is Joseph L. Rauh, Jr. I appear here on behalf of Americans for Democratic Action, of which I am vice chairman for civil rights and civil liberties. Our organization appreciates the opportunity to appear before your subcommittee today and express our views on proposed legislation to prevent abuse of literacy tests for voters.

At the outset, may I say, Mr. Chairman, that while we may not entirely agree on constitutional problems, I would like to pay tribute to your fairness in all respects.

I appeared for 6 weeks before the McClellan committee as an attorney, and I have never had anyone in a Senate investigating committee who acted with any greater fairness toward both labor and management than you did at that time.

Any disagreements that we have later are in good spirit, as far as I am concerned.

Senator ERVIN. Well, I certainly appreciate your compliment.

I think they say that self-praise is half scandal, but I believe in freedom of speech for everybody, and I have found out myself that I always learn more by listening to people I disagree with than by listening to people with whose opinions I agreed.

Mr. RAUH. I think that is mutual.

Americans for Democratic Action supports the administration bill, S. 2750, as a small but significant step in the right direction.

It is ADA policy to support all legislative advances in the civil rights field. Thus, we supported the 1957 and 1960 voting bills, although we recognized that they were halfway measures at best. It is in the same spirit that we support S. 2750—some progress is better than none.

A far more important civil rights bill, for example, is Senator Joseph Clark's proposal, S. 1817, for legislation to require every segregated school district immediately to prepare and put into effect a school desegregation plan. Eight years after the Supreme Court's decisions holding public school segregation unconstitutional, there are still some 2,000 wholly segregated school districts in the Nation.

At the rate we are moving today, school integration will not be accomplished in this decade or even in this century. Hundreds of thousands of Negroes are ending their schooldays without the realization of their constitutional rights and for each of them the failure of Congress to act on school desegregation is a personal tragedy. The Clark bill should be No. 1 on the calendar of those Senators most deeply devoted to civil rights.

Also, more important than the literacy test legislation is the enactment of part III, which would give the Attorney General authority to bring actions in Federal courts to enforce constitutional rights. Such legislation twice passed the House in recent years and the Senate's stubborn refusal to concur with the House on this measure has deprived millions of Americans of their constitutional rights.

More important, too, is fair employment practices legislation. Majorities of both Houses have long supported this legislation. The threat of filibuster has too long prevented its enactment.

More important, too, is Senator Philip Hart's bill, S. 3008, for direct Federal administration of the election process in States which discriminate against Negroes. Congress has taken enough half-hearted steps in the voting field to know now that the only final solution to discriminate against Negro voters in any State is direct Federal administration of elections. While the abolition of literacy tests will remove one more obstruction to Negro voting, no one has the temerity to hope that it will be the end of discrimination. Registrars will continue to be absent; threats will continue; additional methods will be invented. The real solution is in Senator Hart's proposal, and Congress should give it early and careful consideration.

I might inject here our deep belief that new methods can always be found to deny the right to vote. When the "grandfather clause" was outlawed by the Supreme Court of the United States, other methods of discrimination took its place. I am not so naive as to believe that the literacy test abolition will be the end of all discrimination against voting. It is for that reason that we would prefer to see the focus on the Hart bill.

We are, however, practical people. The administration is supporting S. 2750, and this is the only bill that is presently the focus of attention.

Therefore, we support this bill as the essence of the possible. However, we do feel that the four bills I have mentioned, Clark's school

desegregation bill, part III, fair employment practices, and the Hart election bill are the ones that Congress should be grappling with today.

These are the bills that would make major advances in the civil rights pattern of American life. These are the bills that would carry out the platforms of the two parties and the promises of their leaders. These are the bills that the civil rights groups have a right to expect of this Congress and of this administration.

I will say to the chairman again that his opposition to the Democratic platform on these bills was eloquently stated at the drafting committee, of which we were both members, and so I do not suggest that the chairman had subscribed to the platform on these bills.

I only suggest that the platform does, in large measure, support the enactment of all these bills I have mentioned.

Although, as already indicated, we believe other legislation in the civil rights field would accomplish far more than the literacy test proposals, we nevertheless strongly appeal to this subcommittee to report out S. 2750 favorably and strengthened.

If there is one thing that is absolutely clear today, it is that many southern registrars have abused literacy tests in their efforts to deny Negroes the right to vote.

(At this point, Senator Keating entered the hearings room.)

Mr. RAUH. The Civil Rights Commission reports document these abuses. The Attorney General's testimony documents these abuses. The Congressional Record is replete with report after report on these abuses. The case against the southern registrar for his abuse of literacy tests has been proven not only beyond any reasonable doubt but even beyond any peradventure of possible doubt.

The most difficult aspect of testifying in support of this bill is to find any valid argument against it requiring any sort of detailed answer. What is hard to understand about this legislation is not that it is under consideration now, but that it was not enacted long, long ago. It would be difficult to conceive of legislation with less against it.

Certainly no one can seriously object to stopping the proven abuse of literacy tests.

Certainly no one can seriously contend that a sixth grade education is not appropriate proof of literacy.

Equally certainly no one can seriously contend that the proposed statute is unconstitutional. The 14th amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws" and provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The 15th amendment forbids the denial of the right to vote, "on account of race, color, or previous condition of servitude" and provides that "Congress shall have power to enforce this article by appropriate legislation." The proposed legislation which would prevent State officials from denying Negroes the right to vote by abusing literacy test requirements falls squarely within the four corners of each amendment—it enforces by appropriate legislation the letter and spirit of both articles.

The argument for turning the administration bill into a constitutional amendment is thus wholly without substance. Since the bill

is within the clear constitutional power of Congress, it would be a very real abuse of congressional process to proceed by constitutional amendment. Actually, it would be a futile gesture, since the very States that threaten the filibuster against the literacy test bill would require few, if any, allies to prevent ratification of the amendment. Indeed, the whole idea of a constitutional amendment in the literacy-test area, as in the poll-tax area, is a newly developed method of discriminating against civil rights. When Congress has the power to act in the civil rights field, there is no more reason for going the constitutional amendment route, except to block action.

And I would like there to reinforce this point, if I may, Mr. Chairman, and Senator Keating.

It seems to us that this is a new type of discrimination that is growing up in the civil rights field where the majority feels that Congress has the constitutional power to act.

We feel that in the civil rights field, where Congress has the power to act by statute that Congress should so act. That is why we personally opposed the poll tax constitutional amendment and, in this place, I rank myself with the chairman, although for a different reason.

In our view there was legislative authority to outlaw the poll tax and, in view of the legislative authority, it should have been utilized.

We are urging this position upon the House of Representatives although, since the administration takes the other position, it is somewhat unlikely that our view will be accepted.

We do, however, strongly feel that true civil rights supporters will not shift from legislation to constitutional amendment in these areas.

ADA urges amendment of the administration bill, S. 2750, to include State elections. There is no more warrant for allowing abuse of literacy tests in State elections than in Federal elections. The 14th and 15th amendments give Congress the clear power to act in both Federal and State elections.

We believe the case for S. 2750 (amended to cover State elections) is so clear and forceful that it should command the necessary two-thirds vote to cut off a filibuster. The bill is so simple and so moderate that opposition to it is tantamount to opposition to any advance in civil rights. We call upon the Senate to pass this legislation promptly (by cloture, if necessary, after reasonable debate) and then to get on to the important work of passing the Clark bill on school desegregation, part III, FEPC, and the Hart election bill.

Let us move forward with big steps if we can, with small steps if we must. But let us move forward.

I am aware that Senator Keating's bill does include State elections and our position is not that we favor one bill over the other. We simply have taken the practical position that it is the administration bill that Senator Mansfield will call up. Therefore, we have asked that Senator Mansfield's bill be amended to include State elections. We have no objection, in any way, to Senator Keating's bill. It is simply the tactical fact that it is Mansfield's bill that will be up, which causes us to say amend that to put in State elections.

We recognize and thank Senator Keating for having included that provision in his bill.

Senator KEATING. May I say, at that point, Mr. Chairman, that it makes no difference to me whose bill is passed as long as we get the job done.

The job is only partially done by including Federal elections, and if it is constitutional to include Federal elections it is perfectly clear that State elections can be included also.

Even the chairman and I, who differ on the constitutionality of including Federal elections, agree that it is just as constitutional to include State elections as it is Federal.

Mr. RAUH. It is for that reason, Senator Keating, that I do not rely upon article I, section 4, as the basis for the constitutionality of this statute.

Senator KEATING. I do not think you can. I do not think "time, place and manner" covers literacy tests.

I disagree with some on that. I think we have got to rely on the 14th and 15th amendments.

Mr. RAUH. I do rely on the 14th and 15th amendments, and I rely on them because they apply equally to State elections, whereas article I, section 4, does not.

Therefore, it is somewhat academic, and I do not want to be put in the position of necessarily agreeing with Senator Keating's position that article I, section 4 would be irrelevant to Federal elections. However, it is unnecessary to Federal elections and it would be irrelevant to a State election bill.

Senator ERVIN. There is something new under the sun, that you and Senator Keating and myself have agreed on one thing, and that is that if this bill can be sustained or if the principles embodied in any one of these bills can be sustained as valid under the 14th and 15th amendments it can be extended to State and local elections as well as Federal elections.

There is no question in my mind as to that proposition. I do not concede that they can be sustained under the 14th and 15th amendments, either of them, for many reasons, but we agree on the fundamental proposition that if any of these bills can be sustained on the basis of the 14th and 15th amendments, then they can be sustained as to State elections and local elections as well as Federal.

Mr. RAUH. Senator, I agree with that completely. I have the greatest admiration for your judicial statesmanship, but I have honestly been unable to find any serious argument against the application of the 14th and 15th amendments, if you make certain assumptions.

I do not know where you are going to leave me on my assumptions. You may get off of the assumptions at any one of these places.

But on the assumption, first, that Congress can properly find that the literacy test has been used to stop Negroes from voting, on that assumption it seems to me that the 14th and 15th amendments could not have been more clearly written to give Congress this power to prevent abuse of the literacy test. And I have never been clear, Senator, whether it was your position that that finding could not appropriately be made or whether it was your position that even if that finding could appropriately be made, nevertheless, these amendments to the Constitution did not give Congress the power to deal with this problem?

Senator ERVIN. Well, my position, in the first place, is that the Constitution, in section 2 of article I and the 17th amendment, states exactly who can vote for Senators and Congressmen or Representatives. It says that those people who possess the qualifications requisite for electors of the most numerous branch of the State legislature may do so and, certainly, under our system of government the only body which has the right to define the qualifications of those who vote for the most numerous branch of the State legislature is the legislature of the State.

I remember that the Supreme Court has said in many cases that the Constitution itself defines the qualifications of voters for Senators and Representatives in Congress, that the Federal Government has no jurisdiction in that field, and the only limitations upon that State power in the Constitution are those set up by the 14th and 15th amendments, and these merely authorize the Federal Government to take such action as will enforce the prohibition against State action.

These bills are not appropriate legislation to enforce the prohibition on State action, as I see it, for three reasons, and maybe four.

In the first place, I think any controversy as to the meaning of the application of the Constitution of the United States is a judicial question and not a Federal question, and when Congress attempts to settle judicial questions by legislative acts it violates article III of the Constitution by usurping the exercise of judicial power.

That is what the preamble does. I think also that whenever Congress attempts to foreclose a question of fact by a legislative act it violates the due process law clause of the fifth amendment.

So I believe these bills violate article III of the Constitution, in that Congress would be exercising a judicial function, and they violate the fifth amendment in that they attempt to deprive a State of the opportunity to deny and disprove the existence of a question of fact.

Then I believe another ground of unconstitutionality is, as the Supreme Court has declared in a number of cases, that until there has been a violation of the 14th and the 15th amendments by a State Congress has no power whatever under those amendments to take any action or to make any laws applicable to States.

Now, the Attorney General admits that there are only six States out of the 50 States of the Union which have been guilty of any supposed sins and inequities in this respect, and I challenge any bill which undertakes to place any limitation upon the power of those States, those 44 other States, that have not sinned.

I say that no bill can be sustained as appropriate legislation under the 14th amendment that places any limitation upon the power of those 44 States, which have not sinned, to prescribe any kind of a literacy test that they see fit. So I say it is not appropriate legislation under the 14th amendment and the 15th amendment for that reason.

And I say, in the second place, that the only operative part of the administration bill is sections 2 and 3, and there is no reference to abridgement of the right to vote on the basis of race, color, or previous condition of servitude. And the Supreme Court has held in many cases that any legislation, which can be supported on the basis of the 15th amendment, has to be confined solely to that provision, to the prevention of discrimination on the basis of race, color, or previous condition of servitude.

Then I say it is not appropriate legislation enforcing these amendments for a third reason, and that is that the Supreme Court has decided a number of times that these enforcements—that is section 5 of the 14th amendment and section 2 of the 15th amendment—do not empower Congress to legislate generally in this field.

They merely authorize Congress to adopt appropriate legislation to enforce the provisions of the amendment which are a prohibition on State action; and the Supreme Court has declared a number of times that, under this section 5 of the 14th amendment and section 2 of the 15th amendment, Congress cannot invade that domain of legislation which belongs to the State and undertake itself to perform the rights and duties conferred upon the State.

And so this is inappropriate legislation under these two amendments, because it undertakes to have Congress come in and say what kind of literacy tests there should be and it undertakes to outlaw literacy tests in the face of the fact that the Supreme Court has held in several cases that these literacy tests, prescribed by the States, which are based upon the ability to read and write and not upon any understanding or interpretation, do not violate the 14th, the 15th, or the 19th amendments.

Now those are a few reasons why I think the bills are invalid.

Senator KEATING. Mr. Chairman, before the witness continues I would like to say a word. The chairman has reiterated time and again that because only six States have sinned this is not a national problem.

I say that if any one State denies a person the right to vote on account of race, or color, or previous condition of servitude, or sex, or any of the other prohibitions in the Constitution, it becomes a national problem.

It is a national problem morally. And it is a national problem in actual fact because it is conceivable that even one State alone might determine the result of a national election. It is certainly quite conceivable that six States might determine a national election.

Therefore, when any one State flagrantly violates the Constitution of the United States it is a national problem in my view.

Senator ERVIN. Let me ask the Senator from New York a question.

It was my understanding, from the information that I received from the Republican National Executive Committee and the Democratic National Executive Committee, and the Library of Congress, that there are approximately 170,000 voting precincts in the United States. How many registrars in those 170,000 voting precincts would have to sin before Congress stepped in and deprived the States of the power to prescribe the qualifications for voters?

Senator KEATING. This is not a question of sinning, Mr. Chairman.

It is a question of violating the Constitution of the United States, and if there is one election district where that is going on, then it requires remedial legislation, as it is a national problem because it can affect the result of a national election.

If they were sinning in some way that did not involve the U.S. Constitution, there is a limit as to where the Federal Government can go, and a limit beyond which the problem becomes minuscule insofar as the National Government is concerned.

We are not talking only about sinning. We are talking about an attack on the fundamental law of the land; namely, the U.S. Constitution.

Senator ERVIN. Well, I would say to the Senator from New York he takes a very drastic position, and I am sure that he will not be surprised if I disagree with him in the proposition.

Senator KEATING. No; that has happened before, Mr. Chairman.

Senator ERVIN. If one registrar in 170,000 precincts abuses a literacy test in order to deprive a nonwhite of voting may Congress step in and say that the 50 States cannot prescribe any laws of their own to deal with the voting in the other 169,999 precincts?

If the Senator from New York says that, I disagreed with him most emphatically, and I will say why he and I disagree. Fundamentally, I think all constitutional rights should be respected, and I do not believe that there is any justification in the Constitution or any reason to rob the State legislatures of their undoubted constitutional rights under section 2, article I, and the 17th amendment, because some State officials may violate the literacy laws of their State.

Senator KEATING. Of course, the chairman is giving a hypothetical situation which does not exist.

We do not have a case of one registrar doing this. We have a widespread abuse in the number of States.

I am not prepared to admit there are only six, but it is a relatively small number of the 50 States.

Senator ERVIN. Well, the evidence before the committee thus far, by people who certainly do not have any prejudice in favor of the South, is to the effect that there are only 129 counties out of 3,271, and only 6 States out of 50.

But I will desist because I am not optimistic enough to hope that I can convert either the witness or the Senator to the sound view that I have taken on the subject.

Senator KEATING. Or vice versa.

Mr. RAUH. Maybe it is for the witness to be more optimistic, and I would like a minute or two to answer the contentions that the chairman made.

They are very fundamental contentions, and they are certainly entitled to consideration.

I do, however, feel that, in all instances, Mr. Chairman, there is an answer.

I would just like to have a couple of minutes to give what I believe to be the constitutional basis for S. 2750, in answer to the constitutional arguments you set forth.

I would like to say this, Senator, that if I agreed with your premise that this bill was unconstitutional I would certainly agree with your result that it is not furthering democracy to protect the constitutional rights of Negroes by unconstitutional methods.

I am willing to join you—and we can find here another area of agreement—in this, that it does not serve the cause of civil rights in America to proceed to protect one group of rights by destroying other constitutional rights, such as the rights of the State legislatures.

I accept that, and I do not think we should have any disagreement or any suggestion that those of us who advocate this legislation are advocating roughshod overriding of constitutional rights.

I hope you will accept our good faith that if we thought this bill was unconstitutional we would accept your conclusion.

I think it is a very dangerous doctrine to suggest unconstitutional methods of protecting constitutional rights. I accept that. I only would like, most respectfully, now to disagree on whether this bill is, in fact, unconstitutional.

In the first point that the chairman made—as to this being a judicial question and involving article III—and, secondly, where you say it is a question of fact found by Congress and involves the fifth amendment—it seems to me Congress does this every day, and the very nature of legislative power is based upon findings of fact.

Very often you do not put findings in the statute. Most often Congress legislates on certain assumed facts without making findings. But quite often Congress has made findings of fact.

I remember when I was working at the Wage and Hour Division, back in 1939, and defending the constitutionality of that law, and then we relied heavily on Congress' findings of fact on interstate commerce.

I think that it is still a judicial function to say that those findings of fact are completely arbitrary; in other words, to say that this statute is unconstitutional.

If it could be said in court that this finding—that literacy tests have been abused—was totally arbitrary, I would accept that. My own feeling is that on the record, as we know the Civil Rights Commission's findings, and things of that kind, it will not prove to be an arbitrary finding.

But the idea that Congress cannot make findings of fact, subject to judicial review on their arbitrariness, I cannot concede.

Indeed, I think the whole legislative process is based on express and implied findings of fact which are valid until controverted in the court and, obviously, the courts rely heavily on congressional opinion, but if the finding is totally arbitrary the courts very often reject findings of fact of the legislature.

Next, as to the proposition that Congress cannot act until there has been a violation, and that the bill only involves six States, I think Senator Keating said it better than I can. And I accept his statement on that point.

On the idea that section 2 of amendment 15, and section 5 of amendment 14, are not general powers to implement those amendments, I do not read the Supreme Court decisions the way you do, Mr. Chairman.

In fact, the *Siebold* case in 100 U.S. appears to warrant Federal action far beyond anything that is being proposed. In fact, I would say that it gives Supreme Court support for the Hart bill which goes infinitely further than the Mansfield literacy test bill and I do not know what—I was going to say "Your Honor"—I do not know what the chairman's distinction of the *Siebold* case is, but my feeling is that it was pretty clear how far Congress could go—

Senator ERVIN. Yes; the law involved in the *Siebold* case, was a law which Congress enacted under section 4 of article I to govern the procedure for conducting an election. It had nothing whatever to do with the qualifications of voters.

And I think the decision in the *Siebold* case there was proper, because it provided for the supervision of elections and the performance

of duties of election officials in connection with the counting the returning, and the certifying of the results of the election, and I have no doubt that the Congress had the power to enact the statute or the portions of the statute which were involved in the *Siebold* case. I think Congress can go much farther under article IV, section 1, insofar as the conduct of the elections go. But I do not think it has any application.

Mr. RAUH. I see your distinction of it. I had felt that the same power exists under the 14th and 15th amendments where discrimination is shown and the basic thing comes down to the legitimacy of the finding of abuse by this Congress, if it makes a finding by passing the Mansfield bill.

Senator ERVIN. There was a case where they attempted to direct the course of conduct of State elections, special elections, and when the case was before the Supreme Court it was attempted to sustain the statute under the 15th amendment.

The Supreme Court struck it down and said that it was unconstitutional under the 15th amendment because it did not confine its operation or it exceeded the power of Congress in that it did not confine its operation to violations of the 15th amendment but undertook to regulate, generally.

And that is the point I am making.

I think if you read that case you will see that I have some other law on the subject, too.

Mr. RAUH. I am sure the Senator always has the color of law. He is a very careful scholar.

Senator ERVIN. The reason I interrupted you about the *Siebold* case is I do not think you and I are entirely in disagreement about it, because I do think it is proper legislation by Congress, as applied to Federal elections for Senators and Congressmen, under section 4 of article I.

Mr. RAUH. Finally, I suppose, Mr. Chairman, that essentially your most fundamental opposition to the constitutionality of this bill goes to article II, section 1, dealing with the right of the State legislature to set the qualifications for voters.

I have a feeling the rest of this is less significant to you than that basic constitutional right. I would suggest, most respectfully, two definitive answers to that contention.

First, Congress is not here dealing with "qualifications," as I think the Attorney General made abundantly clear.

I did not hear him but I read this in the newspaper. He said you can still have a literacy test; he said you can still have an objective test, an educational test that only college students can vote, or only eighth-grade students can vote. But what you cannot do is have a performance test and knock out the Negroes by utilizing the performance test.

If you are going to utilize a performance test, then a sixth-grade education is an objective standard which he says you must also use to exclude that performance test. But he did not say you could not have a literacy test. He did not say you could not have an educational test.

Therefore, I assert, No. 1, that this bill is not setting qualifications for voting—and I will please finish and then you can tackle me—

and, secondly, even if this were a qualification for voting, which I say it is not, I say that the 14th and the 15th amendments override the previous constitutional provision insofar as there is discrimination against Negroes' rights.

In other words, on any legal basis that we could agree on, the later overriding the earlier, the specific overriding the general, it would seem to me that even if this were a qualification, which I most respectfully submit to you it is not, I would say that the 14th and 15th amendments give Congress the power to override the qualification provision. My only question on that—and this is why I keep saying we are coming back to one question—is this:

Do we disagree on the fact that there has been anti-Negro discrimination through literacy tests?

If we do not, then I think we should agree on the result.

Senator ERVIN. The answer to your argument about the 14th and 15th amendments being subsequent in point of time to the section of article I, is that it seems without much support in view of the fact that the same words were repeated in the 17th amendment which was certainly subsequent to the 14th and 15th in point of time of adoption.

But this bill says, in effect—and I had a great deal of trouble getting the Attorney General to say what his bill means—but this bill says that no State can apply any literacy test to any person of any race. There is no reference to race in the operative part.

It says that no State can apply a literacy test of its own creation to any person, any citizen of the United States, who applies to register to vote, if he has completed the sixth grade in any accredited school of a State or the District of Columbia or Puerto Rico.

That is what the bill says, the way I read the bill.

Mr. RAUH. I would have to amend that, or, I would have to take the Attorney General's position on that.

The word "performance" is in the operative section which you referred to, section 2. The word "performance" is in there.

I believe the Attorney General was correct in his reading of "his and, certainly, that is the legislative history now, until changed, that State can still say "only college graduates." They can still provide an educational test as long as it is an objective test which is not subject to the registrar's utilization on a performance basis and, therefore, on a possibly abused basis.

Senator ERVIN. This bill says, the way I read it, that all literacy tests are arbitrary and unreasonable; that State registrars may not apply what this bill defines to be an arbitrary or unreasonable test to ascertain the person's literacy or his comprehension or his understanding or his intelligence, and it declares that any test which is inconsistent with the completion of the sixth grade is arbitrary and unreasonable. It says that deprivation of the right to vote shall include, but shall not be limited to, the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico.

In other words, it says you cannot deny a man the right to vote on account of his performance on any test if he has completed the sixth grade. Now, if that does not say that the State cannot prescribe or take any action on the basis of any test, insofar as the person who has completed the sixth grade is concerned, I do not know what it says.

Mr. RAUH. Oh, it does say that, sir, but what you added now, that you didn't say before, was the "performance test."

You are quite right, the State may not use a performance test if he has had a sixth-grade education.

Senator ERVIN. That is what I am trying to say.

Mr. RAUH. That, we agree on. But it is not fair to say that the State is completely ousted from this area.

The State can use a different objective test. They can say, as I have said before, that a college education is required, and that would not be barred by this bill.

Senator ERVIN. This bill would forbid States to attribute any importance or take any action on the basis of the examination if the man has completed the sixth grade——

Mr. RAUH. That is correct, sir, but it does not prevent them from saying "We are not going to give any examinations; we are just going to say that no man, white or Negro, can vote if he has not been through high school or if he has not been through college."

That is still committed to the State.

Senator ERVIN. You can examine a person under this as to whether he can read or write, but if it turns out that he cannot read or write, and it also turns out that he completed the sixth grade, then you cannot attribute any importance to that test.

Mr. RAUH. That is correct.

Senator ERVIN. And so it would nullify all of the State laws in cases of individuals who actually cannot read or write.

Mr. RAUH. All of the State power to have performance tests, it does nullify, but it does not nullify all of the State powers, I respectfully submit, sir.

Senator ERVIN. Well, it nullifies the efficacy of the State literacy laws which say that a person must show that he can read and write before he can register and vote, because it says if he has completed the sixth grade all of these performance tests have no bearing on it. That is what it says.

Mr. RAUH. I do not personally desire to add anything on this point unless the chairman has a question.

There is one thing I would like to say, and then I will conclude, and that is this:

We accept Senator Keating's basic philosophy of this problem. One can say it is only six States and, maybe, that is right. But six States are a national problem.

Six States, where there is so clear a denial of the right to vote, is a national problem.

The State of Mississippi is an international problem; voting in the State of Mississippi is an international problem. Every time a Peace Corps representative starts talking about voting in some new country of Africa the question arises, "Well, what about the voting of Negroes in your own State of Mississippi?"

So if it was only one State, Senator, it would seem to us that the power of Congress, in protecting the right of Negroes to vote in that one State, would be adequate to justify action.

This is a world problem now and not just a local problem.

It is a major problem today. It is a human problem and a world problem.

Senator ERVIN. Regardless of those considerations, Congress only acts under the Constitution of the United States.

Now, fundamentally, I think that any qualified citizen of any State, of any race, ought to be permitted to register and vote. I have preached that doctrine all of my life and I shall continue to preach it.

Fundamentally, I disagree with the Attorney General when he says there is any need for legislation like this, because we have upon the statute books a statute which says that any person who has been deprived of his right to vote can sue and recover damages.

The same statute provides that a person who is threatened with a deprivation of his right to vote can sue and obtain equitable preventive relief. Then we have another statute, which makes any registrar, who willfully denies any qualified person the right to register and vote, guilty of a criminal offense, for which he can be fined \$1,000 and sent to prison for 1 year.

Then there is a fourth statutory remedy, which says, in effect, that any registrar who conspires with another to deprive any qualified person of his right to register and vote, is subject to be imprisoned for 5 years and fined \$10,000 or both.

Then we have the Civil Rights Act of 1957, which confers upon the Justice Department the right and the power to bring a suit in the name of the United States, at the expense of the American taxpayers, in order that any person who is threatened with the deprivation of the right to vote is allowed to register and vote.

And then we have the amendment of 1960 to the Civil Rights Act of 1957 which, incidentally, gives me a little concern because it says that State election officials are not even entitled to due process of law, which all of us by common consent would give to people who are charged with treason, murder, robbery, and burglary, and all of the other crimes. The evidence is taken in the absence of the party and he cannot introduce evidence and dispute it before the judge. But under this law, passed especially for nonwhites, the judge, if he finds that any nonwhite has been denied the right to register to vote on account of his race, and this is pursuant to a practice or pattern, can appoint voting referees to pass upon his qualifications.

And I say to the Attorney General, as I said before, in reply to the position of the Department of Justice that they always need more laws; that there are never enough: They are not using the laws they have—laws which are more than sufficient.

Mr. RAUH. In defense of the Attorney General, I would suggest that he has used the Civil Rights Act, in voting cases to the extent that he can. His difficulty is that he has these long cases where he said it takes 180 witnesses sometimes to prove discrimination.

This bill would make it unnecessary to prove that, where a literacy test had been used. I think you are correct. I accept your point that he now has power to do this, but this new tool is necessary to make that power effective because of the difficulties of proof and the long, extended litigation that you get into.

In other words, while it is true that the Attorney General can outlaw abusive literacy tests under the present law, he needs this power, in addition, to really carry out the function which Congress gave him in the 1957 and 1960 laws.

Senator ERVIN. Well, I disagree, generally, with you on that because under this last act the courts do not even have to be bothered about it.

A judge can appoint any number of referees. There is no limitation on them. They can fairly administer any literacy test that I know anything about to a voter in a minute. The judge can administer it himself in a minute.

Now, there may be other considerations about other matters but, as far as the literacy test is concerned, that is all he needs.

In other words, I think I could administer the literacy test myself to 500 people in the course of a day under the North Carolina rule.

Mr. RAUH. Senator, if you were the registrar, we would not need this bill. Now, let's have that perfectly clear.

If the registrars had the feeling that you have for fairness, you would not need this bill. It is because so many of the registrars have not had your feeling for fairness that this bill is required.

And it does not answer our point to say that you can do this and you can do this fairly. I know that.

Senator ERVIN. Well, a Federal judge could, too, because he will be fair.

They have, I do not know how many, laws administered by the Civil Rights Division of the Department of Justice. I do know that they have a U.S. attorney, and anywhere from 1 to 15 assistants, in every Federal district in this country.

Are there not some witnesses from out of Washington?

Mr. RAUH. Yes, sir.

Senator ERVIN. That was not directed to you. I just addressed the question.

Mr. RAUH. Well, I was trying to get off the witness stand.

I certainly do not want to hold Mr. Wilkins up, and I wanted to conclude, if I may.

Senator ERVIN. What I was asking that for was because——

Mr. RAUH. I do not know if Mr. Wilkins has come up. He was to be here and I know he was most anxious to testify.

I see Mr. Speiser is here, and he was scheduled.

I know Mr. Wilkins is coming. I saw him last night. He is planning to be here in a minute.

Senator ERVIN. We have solved the problem. I do not like to discommode the witnesses from out of town.

I want to say that as far as I am concerned, I have enjoyed my colloquy with you. I am sorry that you are on the other side but it is a demonstration of the fact that we have read the same books and have drawn different conclusions.

Mr. RAUH. Well, Senator, I hope that you will report out this bill promptly despite your doubts about it.

I hope it will pass, because not only will it be a small step forward, and we favor all steps, even small ones, but there is a lot of other civil rights legislation we need out of this Congress. I could not agree more with Governor Rockefeller's statement, too, that I read

in this morning's paper, that we need FEPC; we need the Clark bill on school desegregation, and we need a stronger election bill than this.

This is only the first step, we hope, in what the 87th Congress is going to do about civil rights.

I certainly have enjoyed my constitutional law examination this morning, sir, and I want to thank you and Senator Keating for your attention.

Senator KEATING. You favor, do you not, an amendment to broaden the effect of this bill to cover State, as well as Federal, elections?

Mr. RAUH. Precisely.

Senator KEATING. And you favor other amendments to not only strengthen the voting rights of our citizens, but also their rights in education and employment, in housing and in the administration of justice?

Mr. RAUH. I do, sir. In fact, for myself and for the organization which I represent, and I believe Mr. Wilkins will support this as the head of the Leadership Conference on Civil Rights, we understand that a part III will be offered as an amendment to this bill, and we strongly favor it.

We are not scared off by arguments that part III will jeopardize this bill. We believe that it is most important that stronger measures be brought up when this bill is on the floor and every effort should be made to strengthen this bill.

If there is a filibuster, well, so be it. In this world of ours some day we have to change the filibuster rule. It may not be today. It may not be even in 1963, although I am sure Senator Keating will be prepared to try again in 1963.

Sometime the filibuster must lose its strength. Every time the filibuster is utilized, I think, it weakens it as an ultimate weapon.

Some day we are going to win the filibuster fight, and then we are going to have all of this legislation we talk about.

Senator KEATING. Because the votes are there in the Congress and they will be enacted if we can get to a vote.

Is that not true?

Mr. RAUH. I could not agree more. Indeed, I am so tired of this round robin thing that is happening to us.

Every time we want to change the filibuster rule they say to us, "Oh, you can get civil rights legislation"; every time civil rights legislation comes up they say, "Oh, you have got to water it down."

This is a vicious circle. I think the civil rights groups are kind of dizzy from being on this circle. We would like the circle stopped.

Either stop the filibuster and give us the legislation or change the filibuster rule.

Senator KEATING. Well, if you have a feeling of frustration you can imagine the feeling of a legislator who, in general, shares your views with regard to civil rights legislation and what he is up against, but that is a little bit off from our immediate point here.

Mr. RAUH. Thank you.

Mr. CREECH. On page 3 of your statement you say that, " * * Certainly no one can seriously contend that the proposed statute is unconstitutional."

Mr. RAUH. This was not meant as an attack upon the chairman. As I read it, I was somewhat hesitant because I think that could have been more felicitously phrased.

I personally think that it is overwhelmingly clear that the bill is constitutional. I meant no offense. I almost did not read it, because I do not mean to give offense by this, but I am convinced it is perfectly clear that it is constitutional.

Mr. CREECH. Yes, sir. Now, my question, sir, is, irrespective of the chairman. The subcommittee, as you know, requested the attorneys general of the 5 States to comment on these bills, and it has also requested the constitutional law professor at every law school in the country to comment on these bills.

I wonder, sir, what your feeling would be if you were to learn that the majority of the replies indicate that these bills are unconstitutional?

Mr. RAUH. I would be affected by who the different people were. I am not a bull in a china shop. There are certain people whose views would affect me.

I have got a hunch I am not going to change. But I would certainly be affected if Paul Freund were one of these professors or Louis Pollak or Jefferson Fordham.

If those three were included, I certainly would want to take a new look. Or Dr. Dean Griswold, if he were included.

If those people were included I would want to take another look.

I can use Griswold safely, since he testified before your committee as to the constitutionality of this bill, but I would like to look at your list some time, Mr. Creech.

Mr. CREECH. Sir, you have indicated that you agree with the Attorney General that S. 2750 does not set voter qualifications.

Mr. RAUH. That is correct.

Mr. CREECH. Now, by the same token, sir, I believe you have said it is your feeling that the other bills, for instance, S. 2979, which would proscribe voter qualifications, with certain exceptions, would be constitutional.

I wonder, sir, if you are aware that the Attorney General, when he appeared before the subcommittee, said that, in his view, setting the qualifications for individuals would be unconstitutional and would require a constitutional amendment?

Mr. RAUH. I think he is incorrect on that. I do not think he realized exactly what he was saying here.

If a qualification is discriminatory or is used discriminatorily, I believe the 14th and the 15th amendments give the power to override qualifications.

I do not think that is before the Congress here because S. 2750 does not raise that problem, but I do not happen to agree with the Attorney General on his interpretation of that problem.

Was that in his statement or was that in his off-the-cuff answers?

Mr. CREECH. This was something which he said at the conclusion of his statement in a colloquy with the chairman.

He was questioned on this specific statement and he did not disaffirm it. He reaffirmed it, and, during the questioning, he said this was his view. He went on to say, sir, that he felt that the constitutional basis for the legislation before the subcommittee is stronger

when the legislation covers only Federal elections. And so, for that reason, State elections were not included in the administration bill.

Would you care to comment on that?

Mr. RAUH. Yes. Oh, this, Senator Keating, the chairman and I had an earlier agreement.

Mr. CREECH. Yes.

Mr. RAUH. And that was that if it was constitutional for the one, it was constitutional for the other. So that I—

Senator KEATING. Well, may I say that the Attorney General indicated it was more constitutional to just include Federal elections.

Well, I believe it is either constitutional or not. He did indicate that he believed that the inclusion of State elections would also be constitutional but there was a greater question about it—

Mr. CREECH. That is correct, sir.

Senator KEATING. And I do not follow that.

Counsel has made a statement here that a majority of the professors of constitutional law, who were queried, indicated that this bill was unconstitutional.

I was not aware of that figure, and I would like to have counsel, either now or at this point in the record, indicate the number queried and what professors they were.

I know Prof. Arthur Sutherland, of the Harvard Law School, who is the professor of constitutional law there, has given us an opinion that it is constitutional.

Like the witness, we all have those to whom we often turn on constitutional questions, and I think it is very important to know who these professors are and what the score was.

I was not aware, as of this moment, that a majority of them had given their opinion that this legislation was unconstitutional.

Senator ERVIN. I might state that I wrote, as chairman of the committee, to every dean of every law school in the United States, north, south, east, and west.

Mr. CREECH. Yes, sir.

Senator ERVIN. And to every attorney general, and asked them to express their opinions. And unless some member of the committee would object, I would include all of them indiscriminately, in the record.

Thank you very much, sir.

Mr. RAUH. Thank you, sir.

Senator ERVIN. I take no offense at your words because I believe I have made it clear that I think this is a bill which is unconstitutional. I made it clear when I was in a joking mood and when I was in a serious mood, but I am not joking when I say I think it is unconstitutional.

Mr. RAUH. Well, I guess I flunked my examination then.

Senator KEATING. Well, the chairman is always jovial in his serious contentions.

Mr. CREECH. Mr. Chairman, the next witness is the Honorable Hubert H. Humphrey, of Minnesota.

**STATEMENT OF HON. HUBERT H. HUMPHREY, U.S. SENATOR FROM
THE STATE OF MINNESOTA**

Senator ERVIN. Senator Humphrey, we are delighted to have you before the subcommittee.

Senator HUMPHREY. Thank you, Mr. Chairman.

I hope you will permit me just to paraphrase a brief statement. I must go to the Committee on Foreign Relations, but I wanted the opportunity to appear to present my prepared testimony for inclusion in the printed hearing record.

Senator ERVIN. We will have your statement printed.

Senator HUMPHREY. I thank you very much.

Senator ERVIN. You may highlight your statement as you see fit.

Senator HUMPHREY. First, Mr. Chairman, I want to say that I read a most interesting personality profile of the distinguished chairman of the subcommittee in the Washington Evening Star which was complimentary, and justly so, of the distinguished Senator from North Carolina.

I read also the testimony of the Attorney General before the subcommittee, and I want to say before I proceed another moment that I shall not either indulge myself or the subcommittee in any arguments on constitutionality since I am not a constitutional lawyer.

Senator KEATING. Well, you are a pharmacist; you take care of constitutions.

Senator HUMPHREY. Physical; not legal.

I am privileged to be cosponsor of two bills before this subcommittee, one introduced by Senator Javits, and the other by Senator Keating. I, of course, support those bills and likewise support S. 2750, which is limited entirely to Federal elections.

I might add that I listened to the comment of Senator Keating as to whether or not you can be more constitutional on Federal elections than you can on State elections, and I would say that this would be a subject that very brilliant lawyers might want to discuss over a considerable period of time.

This is a matter that will ultimately be determined by the courts themselves. We, in the meantime, have to exercise our own judgment.

My feeling, Mr. Chairman, is that whatever we can do as a country and as a federal government to fulfill the full citizens' rights of our citizenry will strengthen this country and will tend to strengthen the institutions of local government, as well as the institutions of National Government.

It is my view that one of the most precious rights and privileges which a citizen of the Nation has is the right to vote. I believe that this is the most important civil right that we have.

And if we can, by statute or by constitutional amendment, or, however we pursue it—and in this instance, I surely recommend statutory law—strengthen the voting standards and rights of our citizenry, I believe that it will react to the benefit of our Nation and also I might add that I think it will do much to strengthen local government itself.

I know that one of the charges made against Federal law is that it is a usurpation of power by the Central Government. In this instance, Mr. Chairman, I say, most respectfully and most sincerely, that if you can have protection of voting rights in State, as well as

Federal, elections, you will strengthen State government as well as Federal Government in terms of its responsibilities for the general needs of our people.

Now, Mr. Chairman, I have a very brief statement.

It runs a little over six pages, and I should like to have it printed, as you indicated, in the record.

Senator ERVIN. The statement will be printed in full in the record.

Senator HUMPHREY. Thank you. I appreciate this very much.

I know you have a full room of witnesses and unless there are questions I will depart.

Senator ERVIN. The committee appreciates very much your coming here and giving us the benefit of your views.

Senator KEATING. Mr. Chairman, I do want to say this.

All of us, who are authoring these bills appreciate the support of Senator Humphrey. He has been in the forefront of the fight to strengthen the civil rights of all of our citizens.

We work, as you know, in that field on a completely bipartisan basis. It is not a partisan matter. It is a moral matter in our judgment and a great national problem.

It is one of the great domestic problems of our time and I do want to pay tribute to Senator Humphrey for his stanch advocacy of these measures and the way he has stood shoulder to shoulder with the rest of us throughout this long fight.

Senator HUMPHREY. I am very grateful to the Senator. I am happy to be associated with him on his bill.

Thank you, Mr. Chairman.

Senator ERVIN. Thank you.

(The statement by Senator Humphrey follows:)

Mr. Chairman, I want to thank you for affording me this opportunity to testify in support of legislation to put an end to abuses by certain States of literacy test requirements for prospective voters.

I am proud to be joined as a cosponsor of this legislation, S. 480 and S. 2979. I am confident that this Congress will act in this area so that countless numbers of our fellow citizens who are now denied the right to vote because of the color of their skin, will for the first time have the privilege of exercising that most precious of all rights in a democracy—the right to vote on election day.

At the time our Constitution was adopted in 1789, none of the original States required a literacy test or any other educational qualification as a prerequisite for registering to vote. Today with the lowest rate of illiteracy in our history, with our compulsory school attendance laws, with radio and television convenient to all of us, there is much less need for such a test than ever before.

The bills before this subcommittee are modest indeed. They do not abolish literacy requirements as the Civil Rights Commission first recommended. All they do is prescribe an objective means of discovering whether a prospective elector is literate, in place of subjective methods which can be, and are, severely abused. These bills include a perfectly justified legislative finding that a person with a sixth-grade education is able to read and write.

There are two definitions of the word "literate." One definition is "pertaining to or learned in literature," and the other is "one who can read and write." I do not believe that anyone would deny that

the latter definition is the one contemplated by those States which require a literate electorate. Unfortunately, however, there are many cases in which the first definition has been applied—many citizens have been expected to demonstrate a knowledge of constitutional law which only a professor could be expected to possess. The bills under consideration can effectively control this problem. I feel sure that anyone who has completed six grades in an accredited school in this country can read and write, and those who have not may still be required to take a test to determine literacy.

In my opinion, this legislation would be necessary even if there was no evidence of discrimination in the application of the tests, for a strong democracy requires the most liberal rules of suffrage. Every individual is guaranteed first-class citizenship in a true democracy; and when someone is denied that most basic right of all—the right to vote—either by law or by interpretation of the law, he becomes a second-class citizen. And the literacy tests have been and are being used, for the most part, as a subtle artifice to keep Negroes off the registration books and even to remove Negroes from the books who were already registered. According to the Civil Rights Commission, which was instituted to investigate and advise Congress and the President on these matters—

A common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of "good character."

To those who argue that this legislation is a further attempt to usurp local and State rights and powers, I would comment that by making the vote available to all of our citizens, the President and the Federal courts would have less—not more—cause to intervene in the solution of civil rights problems. If every qualified citizen was allowed to vote, local problems could be worked out through normal political processes, and there would be less and less need for Federal intervention.

This brings me to the question of the constitutionality of these bills. I feel sure from past experience that I can safely predict that this issue will be raised by some Members of the Senate. However, to argue unconstitutionality will be as futile this time as it was in 1957—the 1957 Civil Rights Act has been declared constitutional. Federal legislation limiting the States in their application of literacy tests would be perfectly valid, just as Federal legislation outlawing the "grandfather clause" was valid. The Civil Rights Commission, reporting on this point, said in 1961:

The U.S. Constitution leaves to the States the power to set the qualifications for voters in Federal, as well as State, elections. This power is not, however, unlimited. The 15th amendment prohibits the States from denying the right to vote to any citizen on grounds of race or color, and empowers the Congress to enforce this prohibition by appropriate legislation. Therefore, if Congress found that particular voter qualifications were applied by States in a manner that denied the right to vote on grounds of race, it would appear to have the power under the 15th amendment to enact legislation prohibiting the use of such qualifications. Section 5 of the 14th amendment similarly empowers Congress to enact appropriate legislation to enforce the provisions of that amendment. One of these provisions is section 2 of the 14th amendment, which authorizes Con-

gress to reduce the congressional representation of any State in proportion as citizens of that State are denied the right to vote on any grounds other than age or conviction of a crime. The effect of these provisions of the 14th amendment may be to empower Congress to prohibit the use of any voter qualification other than those specified.

Just because the Congress has not acted in this field does not mean it does not have the power to act, and literacy tests, even those that appear constitutional, are too easily abused by individual registrars for the Congress to ignore them any longer. In fact, Dean Griswold, testifying on behalf of the Civil Rights Commission, has stated before this subcommittee that—

In a county in one State for example, a Federal district judge found that six Negro applicants (two with master's degrees, five with bachelor's degrees, and one with a year of college training) suffered racial denials of the right to vote on the specious ground that they could not read intelligibly or write sections of the State constitution.

Mr. Chairman, I have throughout my public career been an outspoken advocate of legislation to bring to an end discriminatory practices against our fellow Negro Americans. Our treatment of Negroes has been a terrible blight on the Nation's conscience. We cannot rest easy, we cannot have a clear conscience, until the last vestiges of discrimination are a thing of the past.

In our efforts to bring an end to second-class citizenship, there is no more important area than voting. This gets to the very heart of the matter. And this fact is recognized full well by those on both sides of the pending legislation.

In a democracy the citizens' power lies in the ballot. When a person is barred from going to the polls on election day, he is denied his right as a citizen, as a member of the body politic.

And so I respectfully and fervently urge this subcommittee to take favorable action on the modest and reasonable proposals pending before it. In so doing this subcommittee will be rendering a great service to our country and to democracy. It will be rectifying a wrong that should have been corrected long ago.

In conclusion, let me say that I appreciate the efforts of the distinguished Senator from North Carolina in holding these hearings and that I am grateful for the opportunity to submit this statement of my position.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Lawrence Speiser, director of the Washington office of the American Civil Liberties Union.

Mr. Speiser.

STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. Mr. Chairman—

Senator KEATING. Mr. Chairman, if I may, before he starts, just say this: I have to—I will not be able to hear Mr. Speiser's statement.

Knowing some of his views in this field, I am sure his comments will not be too far away from my own views, and I will try to return, Mr. Chairman, just as soon as I can.

(At this point, Senator Keating leaves the hearing room.)

Mr. SPEISER. I am always glad to find a measure of agreement with Senator Keating. There are times when we are not in agreement.

Mr. Chairman, I am the director of the Washington office of the American Civil Liberties Union. The American Civil Liberties Union has endorsed legislation under section 2 of the 15th amendment and sections 2 and 5 of the 14th amendment which would declare that voter qualifications other than age, residence, confinement and conviction of a crime are susceptible of use, and have been used, to deny the right to vote on the grounds of race and color and which would provide that all citizens of the United States shall have the right to vote in Federal or State elections, and that this right shall not be denied or in any way abridged or interfered with by the United States or by any State for any cause except for inability to meet reasonable age or length of residence requirements uniformly applied to all persons within a State, legal confinement at the time of registration or election, or conviction of a felony. While the union continues to support such legislation, the union does strongly support the proposed legislation which is presently before this subcommittee as being a major step toward true universal suffrage.

The 1959 Report of the U.S. Commission on Civil Rights and the 1961 Voting Report of the Commission on Civil Rights present detailed factual evidence of the need for legislation to define the use of literacy tests so that these tests may not be used as a means of excluding qualified voters from their constitutional right to vote in Federal and State elections. There is nothing more basic in a democracy, operating under the republican form of government, than the right of each citizen, who meets certain basic requirements of age and residency, to vote in Federal and State elections.

Under section 2 of the 15th amendment, Congress is charged with the responsibility for enacting legislation to assure that the right to vote is not denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Under section 5 of the 14th amendment, Congress is charged with the responsibility for enacting legislation to assure to all citizens equal protection of the laws. The thorough study of the Civil Rights Commission and the exhaustive factual findings of the Commission, together with the evidence found in several court cases, establish that literacy tests, requirements for interpreting State constitution and similar qualifications for voters, are extensively used to deny the right to vote because of race or color and that such tests are frequently administered so as to deny the right to vote to persons who are equally or better qualified than some who are permitted to register.

In view of these findings, it is not only the constitutional prerogative of the Congress, but its responsibility to enact legislation, which will assure that literacy tests and similar requirements for voting are not used in a manner to deprive citizens of their constitutional rights under the 14th and 15th amendments.

It is our understanding that this subcommittee has requested and received opinions from eminent legal authorities on the constitutional right of Congress to enact legislation such as S. 480, S. 2750, and S. 2979. I will not attempt, either on behalf of the union or myself, to present another detailed analysis of this constitutional issue since other legal opinions which you have received to date appear to be

completely thorough. However, I would like to point out that in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 78 Sup. Ct. 985, the Supreme Court expressly recognized that the use of literacy tests, which are fair and reasonable on their face, to deny the ballot to one class of individuals, because of race or color, would be a violation of the 14th and 15th amendments.

In *Gomillion v. Lightfoot*, 364 U.S. 339, 81 Sup. Ct. 125, the Supreme Court held that a State could not establish voting districts in such a manner so as to discriminate against Negro voters. Finally, the very recent Supreme Court decision in the Tennessee reapportionment case, *Baker v. Carr*, the Court recognized that the 14th amendment grants all voters, regardless of race, the right to be protected against unreasonable and unfair restrictions on, or dilution of, their voting rights.

From these decisions and from many other cases which might be cited, it seems clear that Congress is authorized, under section 5 of the 14th amendment and section 2 of the 15th amendment, to enact legislation which will prevent persons from applying literacy tests or similar tests in a manner which results in unequal treatment among voters.

While the union endorses the principle of all of the bills presently before this subcommittee, it believes that this principle can most effectively be implemented by S. 2750. While the union disapproves of and is opposed to all literacy tests, it supports the pending legislation, which would set a sixth-grade education as the basis for judging literacy, as an improvement on existing practices. It believes that none of the bills go beyond the constitutional authority of Congress, but it is particularly clear that this is true of S. 2750, since this bill does not in any way restrict the right of States to establish literacy tests, but only prohibits individuals from denying other persons the right to vote under literacy and similar tests when such persons have received six grades of education in public schools or in qualified private schools. The union also endorses the provision in S. 2750 which assures that persons educated in the Spanish language will not be denied the right to vote simply because they are not also literate in English.

Senator ERVIN. Mr. Speiser, are you a lawyer?

Mr. SPEISER. Yes; I am. I am a member of the bar of the State of California and the U.S. Supreme Court and the District of Columbia.

Senator ERVIN. Now, the Supreme Court has held in the *Lassiter* case and in the *Williams* case and in the *Guinn* case that a State has a right to enact into law a nondiscriminatory literacy test; has it not?

Mr. SPEISER. That is correct.

Senator ERVIN. Now, this bill undertakes to invalidate all literacy tests insofar as persons who have completed a sixth-grade education are concerned; does it not?

Mr. SPEISER. No; I do not believe so, Mr. Chairman.

Senator ERVIN. Well, does it not say that the States cannot deny any person the right to vote as a result of his performance on any test designed to show his literacy if he has a sixth-grade education?

Mr. SPEISER. Well—

Senator ERVIN. In other words, would it not compel the State to desist from relying, in any degree, upon a literacy test in the case of a person who has completed the sixth grade?

Mr. SPEISER. It would make it mandatory to accept that six-grade education as a satisfactory provision for the literacy test.

Senator ERVIN. That is right. And even though the man was actually illiterate, if he could show that he had completed the sixth grade, the State could not deny him the right to register to vote, could it?

Mr. SPEISER. This is correct. Even though a person is illiterate, if he has completed a sixth-grade education that would have to be accepted as satisfying the requirement.

Senator ERVIN. And even though the Supreme Court has held in the *Lassiter* case that the North Carolina literacy test, which requires one to be able to read and write a section of the State constitution in the English language, still, this bill would prohibit North Carolina from putting any individual with a sixth-grade education through such a test?

Mr. SPEISER. Well, obviously, in a situation like this, there are these cases which might arise where an individual has, in fact, completed a sixth-grade education and still possibly—but I believe it to be a fairly remote possibility—would be illiterate.

In one of the latest declarations the Supreme Court, in *Baker v. Carr*, they said that you are not going to require absolutely equality within, for example, the voter districts, but that there has to be some reasonable basis for making some sort of a determination.

Now, this was a major shock to most of the country that felt that the drawing of lines in voting districts was immune from judicial review, and I think the same thing is true here.

If, for example, this bill had said kindergarten, the completion of kindergarten would satisfy literacy tests, then I think you have a talking point, because, within the experience of all of the school districts in the country and the experience of the Civil Rights Commission, investigating it, I think it is fairly clear that there is no reasonable relationship between the fact that you completed kindergarten and your ability to read and write. However, I think as far as the standards throughout most of the country are concerned, by the time a person completes the sixth grade there is a reasonable relationship and expectation that he knows how to read and write.

Senator ERVIN. Well, I think you and I agree on one point, then I think we divide or reach a disagreement.

Mr. SPEISER. Believe me, Mr. Chairman, I am sorry to see us divide on almost anything.

Senator ERVIN. There is no doubt of the fact, as the Supreme Court has held in these cases, that any State has the right to establish by law a State literacy test which applies alike to all people of all races.

Mr. SPEISER. Correct—

Senator ERVIN. And yet this bill says that such laws are arbitrary and unreasonable and unconstitutional.

Mr. SPEISER. No; what it says is that such laws, which provide for the ability to read and write, have been applied in arbitrary, capricious, and unequal fashion.

Senator ERVIN. It says that in the preamble.

Mr. SPEISER. That is correct.

Senator ERVIN. But the preamble is not an operative part of the act.

Mr. SPEISER. But the Supreme Court has, in other cases, relied on findings which have been made by Congress and refer to it as part of the legislative history for determining whether a law is constitutional or unconstitutional.

Senator ERVIN. Well, there is not a word in the operative part of the act that makes any reference to anything that is covered by the 14th amendment or the 15th amendment.

It just merely says that these tests, even though the Supreme Court has held the statutes valid, are arbitrary and unreasonable, does it not?

Mr. SPEISER. No, it says that these tests have been used extensively to effect arbitrary and unreasonable denials of the right to vote.

Senator ERVIN. Now, here is what my position is.

I do not think Congress has the power to declare a literacy test of a State arbitrary and unreasonable unless the wording of the statute establishing the literacy test shows upon its face that it is to be used to deny someone the right to vote under the 14th or 15th amendment.

Now, of course, the 14th amendment does not stop with State legislation. It covers the practical application of State laws. But I deny that Congress has any power to declare State laws unconstitutional which are valid on their face.

And the sole power of Congress is to adopt legislation which would prohibit, not the State from enacting the laws, but prohibit the State election officials from denying qualified voters the right to vote under the 14th amendment and the 15th amendment.

In other words, it is the difference between a valid law and an invalid act. I deny that because a State election official may violate the law of the State, that gives Congress the right to annul the law of the State which is perfectly valid.

Now, do I make my distinction clear?

Mr. SPEISER. I believe I understand but, Mr. Chairman, if that is the case, that a law which on its face appears to be constitutional but is flagrantly violated every day in every way, your position is that Congress is powerless to attempt to correct that situation?

Senator ERVIN. Congress cannot repeal the State law which is valid, as far as the phraseology is concerned. Congress has no jurisdiction to do so.

Congress can step in and adopt legislation which will prohibit an election official from violating that State law which is valid on its face, and denying unqualified persons the right to vote under the 14th and the 15th amendment. In other words, it is the difference between law and practice.

Congress cannot nullify a valid law because some State official has violated the law, but it can adopt legislation which will keep those State officials from violating that law.

Mr. SPEISER. Well, I am afraid that this concept places too much of the burden on the judiciary.

Now, I know that the chairman, in the past, has been critical of the judiciary because you feel that the judiciary has often overextended itself.

But if you hold the position you are now stating, Mr. Chairman, then you are, in effect, saying that you have no other resource but the judiciary; that every time there is an improper, an unequal or a discriminatory or capricious practice, then the sole remedy that the individual has, under those circumstances, is to rely on the judiciary.

In a voting situation, I think it is fairly clear that judicial remedies do not really provide the cure——

Senator ERVIN. Well, now, the alternative to our position, I submit, is worse because it comes down to this in the long run.

It says that even though the State legislature has enacted laws in complete conformance with the Constitution of the United States, that the Federal Government can step in and rob the State of its powers under the Constitution of the United States merely because one of the municipal citizens of the State had violated the State law.

That is what it comes to.

Mr. SPEISER. But it is not merely that. Here you have a whole body of factfinding which was engaged in by the Civil Rights Commission plus the Congress, and you have had situations, for example, when the "grandfather clause" came up and the State of North Carolina——

Senator ERVIN. That clause was clearly on the face of the law.

Mr. SPEISER. Well, I am not sure the Supreme Court would have declared them invalid on the face of them if there had not been put in evidence in the cases, such a wide range of discriminatory practices which existed under the "grandfather clause."

I think this was an important fact.

You are right, and I agree that on the face it should have been declared unconstitutional, but in every one of the cases challenging the "grandfather clause" they had a body of evidence that had been submitted that ended up by being a discriminatory practice, a type of institution which, I think, had a great effect on how the Court ruled on that.

Senator ERVIN. Now, it seems to me that these bills undertake to visit the sins of the guilty upon the innocent with a vengeance.

Now, according to the testimony of Dean Griswold, and according to the testimony of the Attorney General, there are no substantial complaints, they say, in this area except in 6 States out of the 50 States.

And here these bills would step in and limit the constitutional power of 44 States which have not offended the Constitution because of the action of 6 States.

Now, that is a sort of unjust piece of legislation, is it not?

Mr. SPEISER. If you can say that the sixth-grade-education requirement has no relation to the ability to read and write, then I think that might be true.

Senator ERVIN. That is not the question.

This sixth-grade standard is to be set up by a Congress which, under the Constitution, has no power whatever to prescribe qualifications for voters.

Do you not agree with me that, under section 2 of article I and the 17th amendment, the persons eligible to vote for Senators and Congressmen are those persons who possess the qualification to vote for the most numerous branch of the State legislature?

Mr. SPEISER. Well, in the legal opinions which have been submitted to the subcommittee there is obviously disagreement on that question as to whether that section leaves entirely to the States the right of qualification or whether the succeeding sentence after that, about the right of the Federal Government to regulate the "time, place, and manner," gives it an ultimate authority in case there is misuse of that primary authority by the State.

But we do not have to rely on that factor alone here, because I think with the findings that have been made, that we can rely on the 14th and 15th amendments for the authority for this legislation.

Senator ERVIN. Let's throw legalisms out the window a minute and just go by plain simple English.

Does not section 2 of article I and the 17th amendment say in about as plain and simple language that can be found that persons qualified to vote for Senators and Representatives in Congress, if they have the qualifications prescribed by State law for the most numerous branch of the State legislature, are qualified?

I am talking about the English language now. I am not talking about any legalism.

Mr. SPEISER. Well, I do not know how you can divorce this because you cannot ignore the existence of the 14th and 15th amendments.

Senator ERVIN. I am not ignoring their existence. I am asking you a question about the simple English language.

Mr. SPEISER. I am saying that in this area I do not think it helps, in order to take one sentence and say, "Well, what does this one sentence mean?"

I think you have to fit it within the context of what the findings have been and what the situation has been.

Senator ERVIN. Well, you are certainly not averse to agreeing with me on the proposition that insofar as the English language, in which section 2 of article I and the 17th amendment is couched, says that the only persons who can vote for Senators and Representatives in Congress are those who have the qualifications requisite for electors of the most numerous branch of the State legislature?

Mr. SPEISER. All right. But even though that does say that there—can you again ignore the 14th and 15th amendments which would prohibit the States from discriminating by legislation?

Suppose a State passes a law discriminating on the face of it as to those who can vote—

Senator ERVIN. Well, none of these laws discriminates on the face. So we would not bother with that.

Mr. SPEISER. All right. So you are going to have to modify what you say with the plain English—

Senator ERVIN. The Constitution has modified it and the only modification which is made is this.

Here is what the 15th and the 19th amendments say: Provided, however, that a State, in establishing the qualifications, cannot establish a qualification based on race or sex.

Now, that is the whole Constitution on this subject.

Mr. SPEISER. But if you accept my premise, that you cannot take that section of the 17th amendment alone because, as you say, if a State passed a law which discriminated in voting for the most numerous branch of the State legislature, that a State cannot pass such

a law because that would violate the 14th amendment on its face, then I say that there is also the qualifications to what you have just read, based on what the practice would be.

Senator ERVIN. Well, you may disagree with this—but I would say that when you read section 2 of article I and the 17th amendment and the 15th amendment and the 19th amendment together, here is what they say for all practical intents and purposes:

The State legislatures of the various States have the power to establish the qualifications of persons who are entitled to vote for Senators and Congressmen, but in the exercise of this power they cannot prescribe any qualification based on race or sex.

Now, that is all there is to it.

Mr. SPEISER. All right. And I would go further, that in the practice of establishing qualifications, if there has been a practice of discriminating on the basis of race or sex, that this also would be invalid, and —

Senator ERVIN. Here is one of the troubles with this Federal standard. The Federal standard is described by the Congress, which has no power whatever to prescribe any standard as a qualification for voting. Whether it is wise or foolish, good or bad, is not the question, as I see it.

It is an effort to have the qualifications as far as literacy is concerned prescribed by a body which, under the Constitution of the United States, has no power whatsoever to prescribe any qualification.

And the only power it has under the Constitution is to deny the State the right to prescribe a standard based upon race or sex.

Do you have some questions?

Thank you.

Mr. SPEISER. Thank you.

Mr. CREECH. Mr. Speiser. In the first paragraph of your statement you indicate that the ACLU has gone on record as favoring legislation which would exclude voter qualifications other than those based on the inability to meet age requirements, reasonable requirements as to residence, confinement, and commission of a felony.

Now, sir, the Attorney General of the United States, Mr. Kennedy, was invited to appear before the subcommittee as the country's chief law enforcement officer.

Attorney General Kennedy has told the subcommittee that in his view the administration bill, S. 2750, does not prescribe voter qualifications, but that it merely sets standards.

Of course, his bill does not have the same provisions, enumerated here in the first paragraph of your statement, which are contained in S. 2979.

But with regard to his bill, the Attorney General said that it is only setting standards for the qualifications and not the qualifications themselves. And he has gone on to say that if he were, or, if the administration were, setting the qualifications for individuals then "I believe it would be unconstitutional and would require a constitutional amendment."

Now, I wonder, sir, what your view is with regard to the position taken by the chief law enforcement officer of the country, the Attorney General?

Mr. SPEISER. I seem to recall, the last time I appeared before the subcommittee, I also had a different viewpoint from the Attorney General on legislation that he was backing.

I find myself in disagreement with him here as well. We do feel that this can be accomplished by legislation.

I am aware of the fact that the matter is the subject of some controversy, and all I can say is that there obviously are two viewpoints as to whether a constitutional amendment is necessary for such legislation, and we have satisfied ourselves that the legislation can be enacted constitutionally in this area.

Mr. CREECH. I noted also, on page 2 of your statement, that you cited the *Baker* case. In that case, Mr. Justice Douglas, in a concurring opinion, discusses the *Lassiter* case which you also mentioned and discussed.

Mr. SPEISER. Yes.

Mr. CREECH. In the *Lassiter* case, which you have mentioned, the Court stated, among other things:

We come to the question whether a State may, consistently with the 14th and 15th amendments, apply the literacy test to all voters irrespective of race or color.

The Court in *Guinn v. The United States*—citation cited—disposed of the question in a few words:

"No time need be spent on the question of the validity of the literacy tests considered alone since, as we have seen, its adoption was but the exercise by the State of a lawful power vested in it not subject to our supervision and, indeed, its validity is admitted".

The Court went on to say in the *Lassiter* case:

We do not suggest that any standard which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal records, are obvious examples indicating factors which a State may take into consideration in determining the qualification of the voters.

The ability to read and write, likewise, has some relation to standards designed to promote intelligent usage of the ballot.

Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous.

Illiterate people may be intelligent voters. Yet in our society, where newspapers, periodicals, books, and other printed matter, canvass and debate the campaign issues, a State might conclude that only those who are literate should exercise the franchise.

Citations cited.

It was said last century in Massachusetts, that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage.

Citation cited.

North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one, measured by constitutional standards.

I wonder, sir, if you would care to comment further on the *Lassiter* case?

I am sorry that I do not have the *Baker* case before me so that I can put it in proper context as it was cited by Mr. Justice Douglas.

Mr. SPEISER. The *Lassiter* case, involved a literacy test on its face, in which there had not been brought into evidence the question of how it had been applied. This involved a woman who flatly refused to

take the literacy test and wanted to be admitted to vote without taking the literacy test.

The issue was not whether she had taken it and had been arbitrarily denied the right to vote, that was not before the Court. And in that case the Court did recognize the literacy test, although fair on its face, could, in fact, be used in an arbitrary fashion. But that question was not before the Court.

But it seems to me, combining that sort of situation with *Baker v. Carr*, by which you could not tell by looking at the districting that it was done, that it was being done in a discriminatory fashion, nor, for that matter, in the *Tuskegee* case, although the *Tuskegee* case, by looking at that flying dragon, which was used for the districts up around Tuskegee, there was a suspicion that there was not any logical reason to—

Mr. CREECH. I believe Mr. Justice Douglas differentiated between the *Lassiter* case and the *Lightfoot* case that you are speaking of.

Mr. SPEISER. I think the difference is that you did not have before the Court, in the *Lassiter* case, the question of how the literacy tests had been utilized.

Senator ERVIN. Does not that same difference apply to these 44 States where that question has never arisen, and yet this law will deny them that right?

Mr. SPEISER. Well, if there is no reasonable relationship between a sixth-grade education and reading and writing, I would agree, but—

Senator ERVIN. Well, you have not answered my question though.

And that is the question of whether there has been any abuse in any one of these 44 States, since this law would deny them the right to adopt literacy tests of their own to be applied to anybody who had a sixth-grade education.

Mr. SPEISER. Well, here Congress is faced with the problem in which literacy tests have been applied in a discriminatory fashion, and they are going to have to pass laws.

Now, they cannot pass laws for six States. They cannot just pick out the six States and say in those six States a sixth-grade education has to be accepted for whatever literacy standards are set.

They are going to have to pass a law of general application.

Senator ERVIN. Why can't they?

Mr. SPEISER. Congress will pass a law applying to all labor unions and many labor unions will say, "Why pass a law which affects us? You do not have findings that we have done anything wrong."

Well, that is a fact situation. Congress has investigated and determined that certain things have to be done. They pass a law of general application even though it affects labor unions that have not done anything wrong.

But they are still going to be affected by it.

Senator ERVIN. But the difference there is that Congress has the general, absolute power under the interstate commerce laws to legislate as to interstate commerce, and all of these laws that are passed with reference to labor are directly based upon the power of Congress to regulate interstate commerce.

If Congress does not have the power to regulate, it only has the power to pass legislation which will prevent the States from doing what they are prohibited from doing, namely, denying any person the right to vote on the basis of race or sex.

Mr. SPEISER. Again, it seems to me that the situations are analogous even though it derives the power from the Interstate Commerce Act on the one hand and the 14th and 15th amendments on the other hand.

Senator ERVIN. I cannot say that they are analogous where Congress, in one case, has complete power and, in the other case, it is limited.

Mr. CREECH. Mr. Speiser, among the provisions of—

Senator ERVIN. Excuse me just a minute.

I think if you will read the *Civil Rights* cases of 1883, you will find the distinction drawn between the general powers of Congress and the limited powers of Congress in a very clear fashion, and so far as I know, that has never been overruled.

Mr. SPEISER. Well, I think that if I read the *Civil Rights* cases and that alone, that I would not have envisioned that the Supreme Court, for example, would have decided *Gomillion v. Lightfoot* in this country, but there has been a development, Mr. Chairman.

I do not think I could read the *Civil Rights* cases and stay back in the 1800's.

Senator ERVIN. I do not advise you to get an education from that, but I do believe they shed a lot of legal light on the difference between the general powers of Congress to legislate and the limited powers.

And I do not think that has been changed.

Mr. SPEISER. Well, I think there have been modifications.

Mr. CREECH. Mr. Speiser, section 5 of S. 2979 provides that the Director of the Census should compile certain information relative to voter registrations, and voters in each State who vote in elections, and such information as the number of persons of voting age in each State, classified as to race, color, or national origin, and insofar as possible, ascertain the number of persons of each such classification who have voted since January 1, 1960.

Inasmuch as you have indicated, on page 2 of your statement, that it is your feeling that Congress has the authority to pass such legislation as these bills provide, I wonder what your feeling is with regard to the desirability of such a measure in view of the position of the ACLU which, I believe, was taken some months ago, requesting the Bureau of the Census not to include any indications of race in compiling vital statistics?

I wonder, does the ACLU favor that section of S. 2979 in light of its position?

Mr. SPEISER. Well, I want to reserve judgment on that, but I would like to make clear what we objected to it in the census question, which was the statement adopted back in April 1960.

The Federal census has the power to require answers to questions which are put to individuals upon the penalty of paying a criminal penalty for willful refusal to answer questions.

And on the census question they had a question which was denoted as "color or race." And it read as follows:

Is this person white, Negro, American Indian, Japanese, Chinese, Filipino, Hawaiian, part-Hawaiian, Aleutian, Eskimo"—et cetera.

Give the specific color or race.

And we questioned the vagueness of this, first of all. For example, leaving aside the often likely confusion of the person in his mind asking the question or answering it, as to whether it may refer to

national origin, language spoken, or citizenship, there is still much confusion left.

Is it a question about color or about race or are all of the examples of color or race, quoted above, from the census form, to say nothing of "et cetera," equal colors or equal races, by the same definition of color or race?

Why are only the "part-Hawaiians" enabled to obey the instructions to give their specific race?

What about those who are part white, part Negro, et cetera? We had two basic objections.

One was the confusion about the vagueness of the question, as it was phrased and, secondly, the requirement of forcing a person to answer such a question, vague as it was, under pain of criminal penalty.

Now, as far as the section 5 of S. 2979 goes, this raises a question about compiling statistics.

Now, this can be accomplished without forcing an individual, when he registers, to indicate what his race is upon pain, if he does not indicate it, that he can be denied the right to vote.

All I am saying is that we are quite clear that we would object to any type of registration provision requiring the identification of race by the individual on his application for registration, but we still have under consideration the question as to whether other statistics might be compiled in some other fashion which would give some indication whether discrimination is going on, on the basis of race, perhaps by a head count or some other means such as that.

Senator ERVIN. Why do you suppose it was that Congress, if it wanted to prevent discrimination in voting, on the basis of race, color, and previous condition of servitude, submitted the 15th amendment rather than do that by congressional action?

Mr. SPEISER. I am not sure, Mr. Chairman. It may have been what might be called the package deal; as long as the 13th and 14th amendments were being suggested by constitutional amendment, the 15th amendment was taken as well.

Senator ERVIN. Well, do you not agree with me in the thought that Congress would be very foolish to submit a constitutional amendment to put a limitation on powers of the States to prescribe qualifications of the voters when it could do the same thing by congressional action?

Mr. SPEISER. I am not sure we can divorce the passage and the promulgation of the 15th amendment from the time in which it occurred.

Senator ERVIN. Now, if Congress had had any idea at that time that they could pass a law to that effect they certainly would have, because in my State they recognized the existence of the Governor of North Carolina as established under the Presidential plan of reconstruction. Then there was the ratification of the 13th amendment, and when my State and a couple of other States refused to ratify the 14th amendment they said the States were not entitled to representation in the Congress until they ratified the 14th amendment.

So I do not have any idea that if Congress at that time thought they had the power to limit the power of the States to prescribe the qualifications of voters they would ever have gone through the cumbersome process of offering amendments. Would you not infer from the fact

that the only two times that Congress has undertaken to place any limitations upon the powers of the States to prescribe the qualifications of the voters, namely, in the instance of the 15th amendment and the 19th amendment, the fact that Congress in both cases believed at that time that it had no right to invade this area by statute?

Mr. SPEISER. No; Mr. Chairman.

I think another reasonable explanation is that they wanted to insure that no qualification could be based on that and with a constitutional amendment it is in a permanent form that would prevent it from being changed by legislation.

I think that it is a reasonable interpretation to say that they thought they had to do it by constitutional amendment in the first place, when the legislature has the disadvantage of not having the permanence of a constitutional amendment.

Senator ERVIN. In other words, you think it is very reasonable for Congress to think it—

Mr. SPEISER. I do not think that.

Senator ERVIN. Do you not think it would be reasonable in this case for Congress to submit a constitutional amendment, if it thought it had the power to legislate this act?

Mr. SPEISER. Well, again, I think you have to make judgments, and I do not think, under those circumstances, if my interpretation is correct, that it was unreasonable for them to want to build in, with a good deal of permanence, the restriction by constitutional amendment against discrimination, based on race and color in the voting process.

Senator ERVIN. With all due respect to your views, expressed on that, I must say this: I do think it would be very unreasonable for Congress to submit a constitutional amendment with the hope that Congress would thereby acquire a power which it already had in the Constitution.

Mr. SPEISER. Well, again, there may have been the desire to insure that future Congresses did not change that and do something by legislation.

I think that the permanence aspect of it has a good deal of validity.

Senator ERVIN. We thank you very much for appearing before the subcommittee and giving us the benefit of your views and the views of your organization on this very important legislation.

Mr. SPEISER. Thank you, Mr. Chairman.

Senator ERVIN. Do you have any questions, Mr. Waters?

Mr. WATERS. No, sir.

Mr. CREECH. Mr. Chairman, the next witness is Mr. Roy Wilkins, representing the Leadership Conference on Civil Rights.

Mr. Wilkins.

Senator ERVIN. I wish to welcome you to the subcommittee to express the views of the organization which you represent. I am in a little bit of a quandary now, because we have a joint session with the House at 12:30, and I think I am supposed to be in the Senate at 12:20.

I do not want to inconvenience you with recessing now until 2 o'clock if it would cause you to miss a plane or train reservation. And if it will cause you that inconvenience I will forego attending the joint session and hear you.

Otherwise I will recess until 2. I will leave it up to you.

Mr. WILKINS. The chairman is very generous, sir, and I do not have any plans to catch a plane and I will be very happy to testify at your convenience.

Senator ERVIN. Well, under those circumstances, we will recess until 2 o'clock, but I will be glad to forego it if it will inconvenience you.

Mr. WILKINS. It is perfectly all right.

Thank you.

(Whereupon, at 12:14 p.m., the hearing was recessed, to reconvene at 2 p.m., on the same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

Mr. CREECH. Mr. Chairman, the first witness this afternoon is Mr. Roy Wilkins, representing the Leadership Conference on Civil Rights. Mr. Wilkins.

STATEMENT OF ROY WILKINS, NEW YORK CITY, EXECUTIVE SECRETARY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. WILKINS. Mr. Chairman, my name is Roy Wilkins and I am chairman of the Leadership Conference on Civil Rights and executive secretary of the National Association for the Advancement of Colored People.

This statement today is also endorsed, sir, by the following organizations affiliated with the Leadership Conference:

Improved Benevolent and Protective Order of Elks of the World, American Jewish Committee, United Steelworkers of America, National Community Relations Advisory Council, Japanese American Citizens League, American Jewish Congress, Jewish Labor Committee, American Veterans Committee, Women's International League for Peace & Freedom, National Council of Negro Women, Anti-Defamation League of B'nai B'rith, National Association of Colored Women's Clubs, and Phi Beta Sigma Fraternity.

We wish to thank the subcommittee for this opportunity to testify in support of the plan to prohibit arbitrary voting literacy tests. We do so with mixed feelings of satisfaction and regret.

My satisfaction is based on the administration's recognition that its civil rights program needs a legislative base and on the apparent willingness of Congress to take up a civil rights bill of one kind or another. My regret is based upon the limited scope of this bill and upon the fact that it is but a token offering on the full civil rights program pledged by the administration's party platform of 1960.

There is, I believe, unanimous agreement among those organizations supporting civil rights that the bills before the subcommittee, regardless of their merits as voting bills, are inadequate to meet the pressing needs of Negro and other minority group citizens. While we recognize the long-range effect of any effort to extend and protect the voting franchise, we remain keenly aware of other immediate and critical needs in the area of civil rights.

The present bills highlight those needs. In order that our endorsement of the specific legislation before this committee be understood in relation to the varied demands and to the complexities of the issue, I would like to touch later upon some of the items which the Democratic Party—and, in some phases, the Republican Party—recognized in 1960 as warranting attention and action.

Obviously, as we proceed into the halfway year of the present administration, the needs are even more pressing than they were in 1960. Since the distinguished chairman of this subcommittee is known for permitting full discussion of phases of this issue, many of which he personally does not accept, I trust that the committee will indulge my later remarks.

The bills under consideration are S. 480, Senator Javits' bill, and S. 2750, Senator Mansfield's bill, which would standardize the determination of literacy in elections.

Senator ERVIN. We also considered a third bill which was introduced by Senator Keating.

Mr. WILKINS. Senator Keating's bill.

Senator ERVIN. Yes.

Mr. WILKINS. S. 2979.

Senator KEATING. Mr. Chairman, I am somewhat amazed that the witness made no mention of S. 2979 in his statement. This is the bill agreed upon by six Members in the Senate of both parties who are presenting legislation in the field of civil rights to carry out all the Commission's recommendations. The field of voting rights was left to the junior Senator from New York. The field of educational employment and housing and administration of justice was left to other Members. S. 2979 is very much before this committee. If this committee should vote out S. 2750, amendments will be offered to bring it in line with S. 2979.

Mr. WILKINS. We are very happy, Mr. Chairman, to include S. 2979 in our consideration here. Senator Keating's deep and intense interest in this issue is well known to us.

The Javits bill, which we support, would alleviate one of the most flagrant practices of racial discrimination against Negro voters in both Federal and State elections. The Mansfield bill is limited to Federal elections. Obviously, it could not be as effective in combating the problem of election discrimination. The approach used by Senator Javits conforms to the recommendations of the U.S. Commission on Civil Rights, as indeed the Keating bill also embraces those recommendations.

Senator KEATING. S. 2979 embraces them in their entirety.

Mr. WILKINS. That is what I meant by the word "embrace." I'm sorry.

Senator KEATING. It was drawn as a part of a joint effort to implement the provisions of the Civil Rights Commission in the field of voting.

Mr. WILKINS. The need for legislation against ballot-box discrimination involving widespread and continuing violations of the 15th amendment, prompted the Congress to enact remedial measures in 1957 and again in 1960. The fact that only 2 years later the Department of Justice is once more proposing remedial legislation against election discrimination shows how persistent are the violations of

the 15th amendment in some of our States. It also demonstrates—in retrospect—the extremely modest approach which the Congress has taken each time in this area, an approach which has necessitated enactment, as in the instant proposals, of further legislation.

It would seem that the time has come for Congress to exercise all of its power to vindicate the 15th amendment and do so without hesitation or vacillation on a subject involving the very first principles of democratic government.

It is unnecessary for me, Mr. Chairman, to elaborate upon the evidence showing how generally in certain States discrimination is still practiced against Negro Americans desiring to exercise the fundamental right of the franchise. The U.S. Civil Rights Commission has ably and clearly compiled the data, which I will not presume to repeat here.

Rather than review the tragic statistical demonstration of systematic 15th amendment violations in certain States and counties, I would like to quote from a statement which shows the human tragedy posed by these vile racial practices. Father Theodore Hesburgh, president of the University of Notre Dame and a member of the Civil Rights Commission, eloquently described in a speech on February 14, 1960, what the Commissioners had found in their investigation of voter discrimination. I would like to read here a short portion of his statement. I quote Father Hesburgh:

There wasn't a man of us who did not recognize that there were literally millions of people qualified to vote who were not able to vote and probably would not be able to vote for the next President of the United States, much less for their Senators, Congressmen, and State officials. We had seen some of these people. These weren't units to us. They were flesh and blood people. Some of them were veterans with long months of oversea duty and decorations for valor in service. Some of the people were ministers. Some of them were college teachers. Some of them were lawyers, doctors. All of them were taxpayers. Some were mothers of families who were hard pressed to tell their children what it is to be a good American citizen when they could not vote themselves. All of them were decent, intelligent American people, and yet they could not cast their ballots for the President of the United States.

Some had gone through incredible hardships in attempting to register and had been subjected to incredible indignities. I don't know if any of you in this room have had to go through this experience, but even vicariously we had to go through it in listening to their tales. They would go to a courthouse and instead of going in where the white people registered, they would have to go to a room in the back where they would stand in line from 6 in the morning until 2 in the afternoon, since only two were let in at a time. Then people with Ph. D.'s and master's degrees and high intelligence would sit down and copy like a schoolchild the first article or the second article of the Constitution. Then they would be asked the usual questions, make out the usual questionnaire, hand in a self-addressed envelope and hear nothing for 3 months. And then they would go back and do it over again, some of them five, six or seven times, some of them standing in line 2 or 3 days until their turn came.

I am sure, Mr. Chairman, no one can contemplate facts of our national life such as these, without experiencing personal shame that this fundamental negation of democracy continues to be practiced here.

Under the 1957 Civil Rights Act, the Department of Justice has to date filed no less than 24 separate actions in Alabama, Georgia, Louisiana, Mississippi, and Tennessee, and more suits are in preparation. That these suits should be necessary furnishes a sorry spectacle of decency and constitutional rights cast aside a century after the

15th amendment forbade further voting discrimination against Negroes.

The continuing practice of voter discrimination violates the 15th amendment and the integrity of the republican form of government which the Federal Constitution promises in each of the States. Moreover, continuing discrimination against Negro voters sullies the integrity, not only of State elections, but also of presidential elections and of the elections of Members of this Congress.

When in the election of a Congressman or Senator vast numbers of eligible voters have been barred from the franchise by systematic discrimination and discouragement, the election has not been fair and representative; the Member who is thus chosen comes here not by the democratic process, but by some other less admirable one. These are conditions which must give pause to every Member of this Congress and of this committee. They should impel Congress to exercise the very fullest measure of its authority in order to restore the integrity of presidential and congressional elections.

To the extent that Senator Javits' bill provides needed reform against racial discrimination in Federal elections, this legislation should be supported by all conscientious and liberty-loving citizens. But even more is needed in the effort to cleanse Federal elections of racial discrimination. As the Supreme Court made explicitly clear as early as 1879 in its decision in *Ex parte Siebold*, 100 U.S. 371, Congress has the power to take over the enrollment of Federal voters and the management of Federal elections machinery, lock, stock, and barrel. While Congress has traditionally provided that these functions are to be performed by State election officials, the Supreme Court in the *Siebold* case has explicitly affirmed that Federal officials can be vested with these functions, stating, and I quote:

Congress may, if it sees fit, assume the entire control and regulation of the election of Representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the elections; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject.

And the same congressional authority was reaffirmed by the Court in *Ex parte Yarbrough*, 110 U.S. 651, where the Court pointed to the power of the Congress in Federal elections, and I quote:

to provide, if necessary, the officers who shall conduct them and make return of the results.

In the light of these decisions it is surprising that so much outrage should have been expressed in Congress over the proposal to enact a bill containing a provision for Federal registrars in elections as a means of curbing flagrant discrimination against Negro applicants for registration. From the clamor, one would have thought the proposal was completely foreign to American democracy and had never been broached before.

The sobering and compelling fact about the registrar proposal is that it was endorsed by five of the six members of the U.S. Civil Rights Commission as then constituted. This means that two of the three southern members were so appalled at the crude practices disclosed and so impressed with the built-in machinery for perpetuating

the gross system that they felt impelled to recommend Federal election registrars.

The members of this subcommittee and, indeed, the Members of Congress were not privileged to hear, firsthand, at the scene, the bland testimony of those who operate this iniquitous procedure at the precinct level. The men who did hear it were shaken, not merely by the crass deprivations visited upon Negro citizens, but by the violence done the democratic process which alone is the bulwark of freemen of every color and race in our Nation.

Under this system that has been in vogue, citizens remain defenseless before racial and political onslaughts. I cite for this committee the events of recent days in Birmingham, Ala., where a city commissioner, a candidate for Governor, managed to persuade his other two commissioners to cut off funds appropriated by the city commission for the distribution of U.S. Government surplus foods. The recipients of these foods were estimated to be more than 95 percent Negro. The Negro citizens of Birmingham were defenseless before this assault upon their rights by a city commission because they have not the political power to determine who shall be commissioner, and yet they must suffer the arbitrary and often whimsical exercise of that power.

After decades of discrimination against Negro citizens who seek to vote in the election of Members of Congress and of the President, the time has clearly arrived for Congress to employ fair and impartial Federal elections officials instead of continuing to rely upon those State officials who have time and again discriminated against Negro voters.

Senator Philip Hart, of Michigan, introduced in the 86th Congress legislation which would accomplish this purpose, and has a pending bill to achieve this goal in S. 3008. While the organizations I represent support Senator Javits' bill, we urge the Congress also to look carefully at Senator Hart's proposal. The time has certainly come for Congress to exercise all of its authority to vindicate the integrity of Federal elections, by recalling their administration from those State officials who systematically flout the 15th amendment in the exercise of powers Congress has entrusted them in the management of Federal elections. I appeal to the conscience of every Senator and Congressman not to compromise with racial discrimination, but rather to enact the strongest possible legislation to restore fundamental fairness and integrity to all elections.

Since World War II we Americans have heard much and have spoken much in support of free elections for peoples in other countries across the seas and in our own Southern Hemisphere. In fact, an important ingredient of our foreign policy in the cold war has been the demand that our opponents demonstrate their good faith as to freedom by permitting free elections among people now under tight totalitarian control.

In preaching against the sin of disfranchisement, why must our Government's target be always the Babylons overseas in a far land? Why do we not bring our moral outrage, our love of democracy, and the majesty and power of our undoubted constitutional authority to bear upon the sin spots within our own borders? Why not decree—through the enactment of this and other legislation—free elections for all the people in every section of the United States? Is Albania's

soul more precious than that of Alabama? If not, if Louisiana is as important as Lithuania, then the Congress should act favorably and speedily upon the pending bills.

As was indicated above, the pending bills serve, in effect, to highlight other civil rights areas of great urgency. The national interest as well as political pragmatism dictate accelerated congressional action without further delay in three pressing areas, recognized as such by the political parties themselves in their 1960 assessments of civil rights.

As we approach the close of another school year, we note with shame the thwarting of the Supreme Court's mandate of "with all deliberate speed" in school desegregation. By deliberate evasion or gross inattention, the overwhelming majority of school boards affected by the historic decision of May 17, 1954, have managed to continue operations as though the decision had never been rendered. As of the beginning of the current school year only 824 of 2,805 biracial school districts in the 17 Southern and border States had initiated a program of desegregation. More than 2¼ million colored students remain in segregated schools in these States.

May 17 will mark the end of the eighth school year after the decision. In that period, less than 8 percent of the colored school-children covered by the decision have received its benefits. Many of the other 92 percent have completed their formal education so that the hopes that the Court may have inspired in them and their parents have been dashed in the bitter delays dictated by racial discrimination and prejudice.

In this connection, this reference to delays and defiance, we regret, and with some dismay refer to the report in our papers this morning of the advice of a Member of the U.S. Senate to the people of New Orleans to close their schools rather than abide by an order of the Federal Court of the United States of America. The Senator from Louisiana, Senator Russell Long, is reported as having advised New Orleans, "Close your schools and you will have a lot of good school-teachers available for somebody to hire on a private basis."

We submit, sir, that 8 years after this decision it is dismaying to find a member of the U.S. Senate advising defiance and, in effect, suggesting channels by which continued defiance can be maintained.

The rate, thus far, has been approximately 1 percent per year in the desegregation of schools which would indicate completion of the process in a century; but the picture is more bleak than that. A great number of the school districts—540—that have desegregated did so in the first 2 years. Since then, the pace has slowed considerably so that the true rate would effect completion at about the 22d century, if not into it.

Neither the patience of those denied their constitutional rights nor the needs of the Nation can stand this unconscionable delay. Therefore, we call upon Congress to enact the plan embodied in the bill introduced by Senator Joseph Clark, S. 1817.

We stress the urgency of congressional action on S. 1817 because of that provision which calls for initiation of a plan of desegregation by all school boards in 1963. Congressional inaction will result in a repudiation of a solemn pledge to millions of children denied their basic constitutional rights.

The freedom rides and other action by students and others have pointed up another area in which we as a nation have failed to live up to the ideals we present to the rest of the world as worthy of imitation. Denial of equal access to public accommodations, facilities in transportation, libraries, hospitals, recreation areas, and other public services and property solely on the basis of race or color blur the image that we seek to present on the international level.

We recognize the steps taken by the administration through the Attorney General to rectify some of these injustices, particularly in the matter of transportation. Yet the fact remains that persons are still being jailed for using waiting rooms and other facilities in railroad and bus stations that the Supreme Court has ruled are available to them.

Mr. Chairman, today is April 12. On April 9, just 3 days ago, Cpl. Roman Dougworth, a Negro soldier in the service of his country, en route from Fort Ritchie in Maryland, to see his wife in a hospital in Laurel, Miss., was shot and killed by a policeman in Taylorsville, Miss., because he refused to move to the rear of the bus.

The Commission on Civil Rights has reported that some public libraries, supported by Federal funds, deny service or provide inferior service to Negroes.

The same is true with respect to hospitals, public and private, supported by Federal grants. Recently, there was brought to the attention of the Secretary of Health, Education, and Welfare the case of a hospital in Augusta, Ga., that has previously received Federal assistance and was applying for an additional \$400,000. This hospital denies pediatric or maternity care to colored persons. Its facilities for Negroes are limited to 12 beds—in the basement. The requested \$400,000 is earmarked for expansion of the—and I quote—"white" facilities.

Similar instances of denial of public services because of race are widespread. When combined they add up to a de facto second-class citizenship status for some 18 million Americans under a Constitution that provides only 1 class of citizenship.

Dedicated individuals and organizations through recourse to the courts have established the legal principle that governmentally supported segregation and other forms of discrimination are unconstitutional. In specific instances, this legal principle, sir, has been translated into actuality, but the gap between the legal principle and its application remains gigantic.

We submit, no individuals or organizations are capable of closing this gap under conditions that exist today. In some areas of the Nation all branches of government, executive, legislative, and judicial, have been utilized to preserve the racial status quo or to reverse it where some progress has been made. Literally hundreds of laws and ordinances have been passed since May 17, 1954, to thwart implementation of the school segregation decision of the Supreme Court and subsequent decisions relating to equal protection of the laws.

Arrests, jailings, and fines have been employed. Curtis Bryant, a Negro citizen of McComb, Miss., was arrested in connection with a demonstration by some students in his city. He was charged for want of anything better, with contributing to the delinquency of a minor, because he had been present at a meeting where these young people began their demonstration. To illustrate, Mr. Chairman, how this

machinery of government is stretched to employ reprisals and mistreatment, the sheriff of that county, Sheriff Clyde Simmons, is quoted as supporting this type of action, and the police chief of McComb is reported as saying, "We are trying to rook him, Bryant; that is, in on the damned thing somewhere."

In other words, there was no clear law and no clear violation, but the people there were using the power of government which these Negro citizens could not control through their lack of the vote or influence—they were using their power of government to rook him in on it somewhere.

In addition to governmental action, those seeking vindication of their constitutional rights have been subjected, in many cases to economic sanctions, social and political pressures and in some cases, physical violence.

We do not think it fair that this great burden of implementing the equal protection clause of the 14th amendment should continue to be borne alone by those who have been unjustly denied its protections. The Government has an interest in the upholding of the Constitution. It should not remain neutral between those who support the Constitution and those who would trample it underfoot.

In addition, the international prestige of the United States and the requirements of national policy that dictate full utilization of all human resources should give a priority to the quickest possible solution to problems arising from denials of equal protection.

For these reasons we feel that the deletion by the Senate of part III of the then administration's civil rights bill in 1957 was most unfortunate. We believe that many of the problems now encountered, such as the hardening of resistance to the Supreme Court's mandate, the slow pace of desegregation, the willingness on the part of local officials to defy the regulations of the Interstate Commerce Commission are traceable, in part at least, to the failure of Congress in 1957 to add its support to the struggle to make the 14th amendment a living reality.

We urge Congress to act, in this session, to enact legislation authorizing the Attorney General to prevent denials of 14th amendment equal protection rights because of race, color, or creed in the same manner he is authorized to protect 15th amendment rights under the Civil Rights Act of 1957.

Senator KEATING. Mr. Chairman, I have been sent for to go to the Senate floor. I wonder if the chairman will permit me to intrude to ask just a few questions to clarify the record.

Senator ERVIN. That will be perfectly all right because I realize all of us here in the Senate have many jobs to do and we are required to do them at the same time and cannot be in two places at once. So you can certainly do that.

Senator KEATING. I appreciate that and I will, of course, read the rest of the witness' statement, which I know will be very helpful.

Mr. Wilkins, you recognize, do you not, that S. 480, which was introduced before the report of the Commission on Civil Rights, and S. 2750, are almost entirely confined to literacy tests?

Mr. WILKINS. Yes. They are the literacy test bills, sir.

Senator KEATING. And is it not true that the Commission on Civil Rights recommended a number of other measures besides that dealing with arbitrary literacy tests, to further protect the right to vote?

Mr. WILKINS. They did.

Senator KEATING. Do you support the other recommendations of the Commission in the field of voting?

Mr. WILKINS. Well, Senator, I'm sorry. Do you mean do we support them as embodied in a piece of specific legislation, or do we support them generally?

Senator KEATING. Do you support them generally, or as embodied in S. 2979?

Mr. WILKINS. The reason no specific reference was made to S. 2979 in this testimony was that it was prepared a long time ago for circulation among a large number of organizations for their approval, and there was not time to include S. 2979. It was not included at this time for circulation among 50-odd organizations. But the lone literacy test segment of the Civil Rights Commission's recommendations did receive the endorsement of these organizations. This is an organization statement, of course.

Senator KEATING. S. 2979 was introduced on March 13 and was introduced for myself, Senators Douglas, Clark, Javits, Hart, Scott, Humphrey, Long of Missouri, Case, Dirksen, Morse, Bush, Kuchel, Proxmire, and Williams of New Jersey. It is intended to express in legislative form the recommendations of the Civil Rights Commission in toto in the field of voting rights, and it was introduced as the official bill sponsored by those Senators, many of whose names are familiar to you.

Mr. WILKINS. Oh, yes.

Senator KEATING. I hope that you will circulate among the organizations for whom you speak, the provisions of S. 2979, and I hope that this committee may have the benefit of the views of these organizations with reference to that legislation.

Mr. WILKINS. We will. For our own organization, Senator Keating, we will be happy to put our views on the record. It is difficult to get a consensus among 50 people on a long piece of legislation covering, I believe, to use your own word—embracing—all of the recommendations of the Civil Rights Commission.

Senator KEATING. In the field of voting.

Mr. WILKINS. That's right. Though I am sure that the organizations who know of your deep interest in this matter, and your record on it in both Houses of Congress, will want to give every consideration to the details of S. 2979.

Senator ERVIN. I think maybe I can clarify this whole situation of why your statement does not deal specifically with the bill S. 2979. Back about in the latter part of January, as chairman of this subcommittee, I think that I sent you a letter.

Mr. WILKINS. You did.

Senator ERVIN. Inviting you and your organization to express your views on the voting rights bill which had then been referred to the committee, which was Senator Javits' bill and the Mansfield-Dirksen bill.

Mr. WILKINS. That is correct, sir.

Senator ERVIN. And this other bill, S. 2979, was introduced and referred to the committee after that invitation was sent, in which you were notified of the fact that the subcommittee did have under consideration the other two bills.

Mr. WILKINS. Mr. Chairman, that is correct, and we confined ourselves to your invitation.

Senator ERVIN. That was after the other bill was introduced, and after, apparently, you had prepared your statement, which was circulated among the various organizations you represent, we did send you a copy of Senator Keating's bill.

Mr. WILKINS. The committee did, and we have copies from other sources. It is almost as difficult to get a consensus among organizations, Mr. Chairman, as it is among Senators.

Senator KEATING. I hope that the organizations for which you speak have somewhat more uniformity in their views than the members of this subcommittee at least, and the Members of the Senate. You do, I know, say that the organizations, all of them, support S. 480. The point I make is it will seriously pull the rug out from under those of us who favor a considerably broader bill than S. 480 if it were not made clear that these organizations at least are not opposed to S. 2979. I suspect that if they were circulated with reference to it most, if not all of them, would support the provisions of S. 2979. The same is true with reference to your statement endorsing the fair employment bill introduced by Senator Clark, S. 1817, as part of this same movement to which I have referred. Senator Clark introduced a later bill, S. 2981, with regard to employment, which I cosponsored, and which many others cosponsored. It was cosponsored by Senators Douglas, Hart, Javits, Keating, Scott, Humphrey, Long of Missouri, Case of New Jersey, Dirksen, Morse, Bush, Kuchel, Proxmire, and Williams of New Jersey.

It would certainly be helpful if these organizations could be made aware of what was done on the 30th day of March, which many of us look upon as a rather historic day in this field, when bills were introduced by five Senators, cosponsored by all of the others, and with the chief cosponsor in each instance being Senator Douglas; and which those of us who are trying to advance this cause in this field are looking upon as documents of some dignity and standing.

Therefore, to have the views not only of your own fine organization, but the others interested in this field, would be very helpful in regard to all of these measures. It is my expectation that all these bills will be offered as amendments when this bill is reported to the floor or when the issue of literacy tests is taken up in any other manner on the floor on or about April 24.

Mr. WILKINS. I would like to say for the Senator that a good many of these organizations will file individual statements on one aspect or another. I am certain that those who are not now familiar, and I can't imagine those that are not, will give every endorsement to the legislation which has been introduced by the Senators, all of whom are friends of this area of legislation, and have been for many years.

Senator KEATING. Do you have any estimate of the number of additional citizens who would register and vote if the literacy provisions of any of these bills were enacted?

Mr. WILKINS. No, sir, I have not, because it is not possible to take a census of those persons who, let us say, finished the sixth grade. Nor do you know whether all of those persons, should they present themselves and satisfy the literacy tests, as to how many of

them might fail on some other requirements set up by the State and not related to race.

Senator KEATING. You have discovered, have you not, that the literacy requirement is only one method used to disenfranchise voters?

Mr. WILKINS. Yes, sir; but it is now the principal method, I think and disfranchises more people than any other method which is presently in use, because it is a subjective test. It is whimsical. It is very frustrating that the basic right of an American citizen can be decided by voting clerks' interpretation of the English language, let us say. Not the Constitution. Not even the State constitution, but the English language, or the pronunciation of words. That a man should be disfranchised and denied the right to cast his vote for the President of the United States because a voting clerk says he did not pronounce a word as he, the clerk, would have pronounced it, this is a whimsicality that ought not to exist in a country like ours.

You know, there is an old story. The chairman of this committee enjoys fame, of course, as a raconteur. Perhaps you would indulge me in this very short story which illustrates the point you brought up. It is told that a Negro applied to register to vote and the two clerks sitting there said, "Well, you must recite the Constitution." So the man said, "All right." And he stood up and began, "Fourscore and seven years ago our fathers brought forth upon this continent * * *" and one of the clerks looked at the other one and said, "Damned if he don't know it."

Well, Senator Keating, one's ability to vote and to exercise the other functions in the franchise, to determine a government by consent of the governed, should not depend upon whether somebody knows Lincoln's Gettysburg Address from the Constitution of the United States.

Senator KEATING. I agree with you, and I think that probably it is fair to say that this is the principal device used to deny the right to vote. You are also familiar, of course, with the problem sometimes of finding the registrar. You are also familiar with this problem of the voucher system in some States where there must be two voters in an election district to vouch for anyone before you can get approved, and in an election district where there is no Negro registered it is a very difficult thing to accomplish that.

There are many other things which I have the feeling should be corrected while we are at this job. We should do a full and complete job, and not a partial job.

I thank you, Mr. Chairman, for allowing me to intervene and I thank the witness for allowing me to.

Senator ERVIN. If I may, there is a story similar to what you told. Awhile ago there were three lawyers together and one of them bet another \$5 that he did not know the Lord's Prayer. So each one of them put up \$5 with the third one. Then they called on this lawyer to recite the Lord's Prayer, and he said, "Now I lay me down to sleep * * *." and the other lawyer said, "Go ahead. Pay him off. I didn't think he knew it."

Mr. WILKINS. The concern of Congress with the problem of unemployment, particularly unemployment caused by changing economic factors, such as automation, increased productivity and the mobility of labor, has been manifested during the 87th Congress by the passage

of area redevelopment and manpower retraining programs. This is good and has our support.

We believe, however, that Congress has overlooked the most important element that contributes to large-scale unemployment, the human element of racial prejudice that results in denial of employment opportunity to many qualified persons solely because of race, color, national origin, or creed.

The Departments of Labor and Commerce reports on unemployment for 1961 revealed the rate for nonwhite males to be 12.9 percent and that for nonwhite females to be 11.9 percent. The comparable rates for white males were 5.7 percent and for white females 6.5 percent. The most recently available figures on hard-core, long-term unemployment, those seeking work for 6 months or longer, show that 28.7 percent of this group are nonwhite, though they make up only 10.8 percent of the labor force.

These statistics show that the average nonwhite person now unemployed and seeking employment has less than a 50-percent chance of a white person of securing it. If he is fortunate enough to get a job, his income will likely be only 60 percent of that of his white counterpart.

Further statistics show, and I will only cite a few of these that are dramatic, that even when Negroes are employed their occupations are distributed as follows.

For 1960 the figures show that private household and other service workers, plus farm and nonfarm laborers—these are the lowest paid categories—account for 54 percent of the Negro employment: that is, more than half of those employed are confined to domestic service and farm labor and nonfarm labor. Listed as clerical and kindred workers was only 7.8 percent. As professional and technical, only 4.8 percent. As managers, only 2 percent.

Not only are job opportunities denied the Negro applicant, but the avenues through which he could qualify are often closed to him.

The State employment services, probably the principal source of employment recruitment, in some areas operate on a racially discriminatory basis, according to the Civil Rights Commission's documentation. This occurs in an operation that is financed 100 percent by Federal funds.

As executive secretary of the NAACP, I submitted in 1960, to the Vice President, as chairman of the Committee on Government Contracts, a study of discrimination in the apprenticeship training program, prepared by the association's labor secretary, Mr. Herbert Hill. It was our conclusion, based on the facts contained therein, that full employment of Negroes in the skilled trades could not be expected before the year 2034 at the present rate of training.

I have previously indicated our support of the area redevelopment and manpower training programs.

At the same time, I would like to express our dismay that strong non-discrimination provisions were not included in these pieces of legislation. The results of this failure to provide protection for minority groups is already apparent.

The largest retraining program planned under the Area Redevelopment Act has already fallen victim to the doctrine of white supremacy. The retraining of some 1,200 displaced farmworkers to be tractor and

them might fail on some other requirements set up by the State and not related to race.

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equipment operators has been canceled. Because many of those to be trained would be Negroes, the program ran afoul of Mississippi politics and was abandoned.

We believe that the best approach to these problems of discrimination in the field of employment is an FEPC bill with strong enforcement powers along the lines of S. 1819, introduced by Senators Clark, Hart, Douglas, Williams of New Jersey, Long of Missouri, Humphrey, Gruening, Neuberger, and Pell, at the request of the President.

In this connection we wish to note our disagreement with those who would delete from proposed FEPC legislation the provisions for administrative enforcement. While we respect the motives of those who support these changes, we regret the growing tendency to use civil rights legislation as a vehicle for other broad judicial and administrative experiments that result in dilution of the effectiveness of this legislation. We believe that these reforms should stand or fall on their own merits in separate legislation.

What we ask is nothing new. It is not a program conceived by visionaries or utopian planners. There is nothing we here suggest that was not contained in the 1960 platform of the political party that now controls the executive and legislative branches of the Federal Government. Several of these items were contained, also, in the 1960 platform of the Republican Party. There is nothing we here suggest that is not already before the Senate in bills, some of which were introduced on behalf of, and at the request of, the President of the United States.

The redemption of these pledges requires of the Congress, at the very least, the passage in this session of legislation to implement the May 17, 1954, decision of the Supreme Court to authorize the Attorney General to protect 14th amendment rights and to establish a national fair employment commission with enforcement powers.

In conclusion, Mr. Chairman, we reiterate our remark at the outset of this testimony: the fact that additional legislation is now proposed to protect the voting rights guaranteed by the Constitution indicates clearly that the Congress proceeded in timorous and piecemeal fashion in its enactments in this field in 1957 and 1960.

We submit that that error should not be here repeated. The basic, human individual freedoms of U.S. citizens ought not be the subject of haggling and hairsplitting. What is needed and asked is not a New Frontier or even a New Deal—or pieces thereof—it is simply the old deal, the one promulgated in our 18th century Declaration of Independence, our Bill of Rights, and our Constitution.

Thank you, Mr. Chairman.

Senator ERVIN. Do you have any questions?

Mr. CREECH. Mr. Wilkins, you are aware that S. 2750 recites the fact that some Spanish-speaking people were denied the right to vote, and that the lack of knowledge of English is not itself a justification for denying the right to vote to these Spanish-speaking people if they are exposed to media of information so that they may be well-informed as to the issues to be considered in the election of the candidates.

Would you care to comment on this aspect of S. 2750?

Mr. WILKINS. On what aspect of it?

Mr. CREECH. Regarding the fact that a Spanish-speaking individual would be permitted to vote even though he could not read or write English.

Mr. WILKINS. As I understand it, the Spanish-speaking people are citizens of the United States. They have been reared in a Spanish-speaking section of our country. If they are literate in Spanish then we cannot say that they are illiterate citizens of the United States. No? The fact that they cannot speak English fluently—did I understand you to say they would have no access to information about elections?

Mr. CREECH. I presumed you were already familiar with this and I did not read it to you. Here is the exact wording: "Congress further finds"—and this is under S. 2750, under subsection (3)—

Congress further finds that large numbers of American citizens who are also citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used; that these citizens are well qualified to exercise the franchise; that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources; that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process.

Mr. WILKINS. I would agree with that.

Mr. CREECH. Sir, is it true that there are also large numbers of people of various ethnic groups who speak languages other than English or Spanish, who might also be well qualified to vote?

Mr. WILKINS. Who are citizens of the United States?

Mr. CREECH. Yes.

Mr. WILKINS. I would assume so. Citizens who speak, for example, what language?

Mr. CREECH. I am told, since you reside in New York City, that in New York City there are sections of the city in which there reside large numbers of people who speak Italian; and perhaps in Chicago there are large numbers of people who speak Polish.

Mr. WILKINS. That is right.

Mr. CREECH. And perhaps in San Francisco, Chinese; and there are various other language groups in which people are not proficient in the English language, or in Spanish.

Mr. WILKINS. But there is no allegation that they are not proficient in English. I would not be able to say here that the citizens of Italian descent who speak Italian in New York City, or those who speak Polish in Buffalo, or Detroit, or Chicago, are not also proficient in English. It does not follow. They are bilingual. All the ones I have met, at least.

Mr. CREECH. Then would you say that the Spanish-speaking people are bilingual, too?

Mr. WILKINS. I am saying there does not seem to be an analogy between the Italians and the Spanish-speaking people. The Italians speak English and read English. That is, from my observation. People who read Hebrew speak English. People who read Polish speak English.

Mr. CREECH. Apparently your observation is not the same as that of a number of people who have been in communication with the subcommittee, because we have been told that in other sections of the

country, for instance, in the Southwest, there are large Indian populations that speak their native Indian tongues and do not speak either Spanish or English, and are not proficient in either of those other languages. We are told that there are certainly in the environs of Chicago people who speak Polish. For instance, in political campaigns, some of the candidates come in and even address these people in their foreign tongues. But if you are assuming, and the basis of your experience has been that you know of no instance in which there is any other ethnic group in the country that speaks only their native tongue, other than the Spanish-speaking people who reside in New York City, then there would be no point in my pursuing the question.

Mr. WILKINS. May I say this: I was answering your question only because you brought in the proximity of my residence to certain of these ethnic groups, and all I can testify, of course, is as to my personal experience with them. I have no doubt that there are persons in the United States from some other country who haven't learned English, or never knew English. It seems to me that I recall the mother of a famous ballplayer who attended the world's series to see her son play, and still, after 40 years in this country, could not speak English. I don't say that those people don't exist. I am only saying that I haven't met them.

Mr. CREECH. Have you met Spanish-speaking people who didn't speak English?

Mr. WILKINS. The ones I have met spoke English. I mean, me personally. I know there are—

Mr. CREECH. So you would presume then, as a logical consequence of what you are saying, that there would be no necessity for this, because based on your experience there is no one who is not bilingual?

Mr. WILKINS. Oh, no. There are 700,000, I think, in New York City, are there not?

Mr. CREECH. I believe that is the figure we have had.

Mr. WILKINS. And I haven't met anywhere near 700,000, so there could be a large number not able to speak English.

Mr. CREECH. I see. I will not proceed then with this question. The subcommittee was told by Mr. Hartnett, the representative of the International Union of Electrical, Radio, & Machine Workers, that his union, like most, is constructed in a manner which permits it to operate somewhat as does the U.S. Government. He went on to say, and I am quoting from his statement:

We think that the principles which we find good would be equally good when embraced and embodied or employed by the Government. What we are suggesting then as a union is that we will not accept the idea that people ought to be discriminated against because of their race, color, or creed, or national origin, and we would not like to resort to any devices that permit that to happen, and we do not do that.

Then he went on to point out that they do not have any registration on this basis of their union members, on the basis of race, creed, color, or national origin. As you are aware, S. 2979 has a provision which would require the Director of the Census to compile certain information which would include the number of persons of voting age in each State classified by race, color, and national origin. You were here, I believe, this morning, when Mr. Speiser was testifying with respect to the position of the American Civil Liberties Union with regard to

their requesting in 1960, the Bureau of the Census to desist from requesting such information with regard to race, I wonder, sir, what is the position of your organization with regard to collecting similar information?

Mr. WILKINS. We have not duplicated the American Civil Liberties Union's protest in this special area; nor did we know about Mr. Hartnett's union's policy, but I was impressed with Mr. Speiser's answer this morning that their recommendation came in connection with the compulsory disclosure of such information on the penalty of imprisonment. This is what the ACLU objected to.

Mr. CREECH. Of course, I believe that is a standing requirement of the Bureau of the Census; namely, that the law requires you to comply with the Bureau of the Census questionnaire as, of course, it does in so many categories, and there is a penalty provided. So, presumably, individuals who refuse to supply this information I should think might very well find themselves in difficulty also. Because here it says in section 5, "The Director of the Census shall." Not that he may but that he shall—

as soon as possible after the enactment of this Act, compile comprehensive information and statistics relating to the registration of voters in each State and the number of registered voters in each State who vote in elections held in such State. Such statistics shall include—

(1) the number of persons of voting age in each State, classified by race, color, and national origin, who are registered to vote; and

(2) insofar as it is possible to ascertain, the number of persons of each such classification who have voted in any election since January 1, 1960.

Mr. WILKINS. Insofar as it is possible to ascertain.

Mr. CREECH. That is only with respect to the second section.

Mr. WILKINS. I would submit that that would have to apply to the compilation of all the data. One of the gripes of the colored people in this country is that they don't know how many colored people there are in this country. They can't tell from the census. There isn't anything—what is a woman going to do when you look at her and say, "Put down your race." She may be one sixty-fourth Negro. She may be one thirty-second Negro. She may be one-quarter. Is she going to ignore the three-quarters and put down the one-quarter on her own? Or suppose the census taker says, "I looked at John Jones and I checked on here 'Negro,' or checked 'white'." The fact is that a good many of these people the census taker checked "white." Even Negro census takers do that. So you get into a wilderness here that I don't know how you will find your way out of.

Mr. CREECH. I am advised that Senator Keating has said that he personally has no intention to ask for the enforcement of the voting statistics by criminal prosecutions, and he would make a statement to make this clear, presumably at the time that it came on the floor. But I just wondered if your organization had considered this section of the bill.

Mr. WILKINS. It would seem to us, sir, that the Bureau of the Census at the present time has sufficient information to supply the requirements of this provision if it should remain in the bill, and that it would have to proceed in the event it does not have it, on the basis of the phrase used there, "insofar as it is possible to ascertain."

Mr. CREECH. That only pertains to section (2).

Mr. WILKINS. I understand that.

Mr. CREECH. With respect to the past voting; that is, section (2), says—

Insofar as it is possible to ascertain, the number of persons of each such classification who have voted in any election since January 1, 1960.

Mr. WILKINS. I understand that, and in the bill it only applies to that, but I am suggesting in the general compilation of this information, of racial data, it would have to be on the basis of "insofar as it is possible to ascertain," because I have suggested the difficulties you run into with hard and fast classifications.

Mr. CREECH. Actually, I believe that the Bureau of the Census uses sampling techniques, anyway.

Mr. WILKINS. Yes, they do.

Mr. CREECH. Always.

Mr. WILKINS. I think that is correct.

Mr. CREECH. But your organization has never taken a position with respect to whether this is desirable or undesirable. Is that right?

Mr. WILKINS. We haven't taken any position with respect to voting records.

Mr. CREECH. How about the overall requirement of such information by the Bureau of the Census?

Mr. WILKINS. In certain instances we have urged the abolition of this type of requirement because it does not supply any vital information that is necessary or needed, and we find that we get along fairly well without it. A good many of the colleges, for example, do not require registration of students by race. So you ask the University of California, "How many Negro students do you have?" and they tell you, "We don't know." You ask Wayne University in Detroit, "What is the size of your Negro enrollment?" and they say, "We don't keep records by race." Well, our association may be temporarily handicapped in some argument by not being able to say that there are 4,000 Negro college graduates, but the satisfaction of being able to cite that exact figure does not approach the satisfaction of the equal treatment you get by the lack of designation.

Mr. CREECH. You mentioned that on occasion you have asked the Bureau of the Census to abolish this requirement?

Mr. WILKINS. No. Not the Bureau of the Census. I am sorry if I conveyed that impression. I meant, for example, in the motor vehicle license blanks in New York State we have raised this question. Not with respect to the Bureau of the Census.

Mr. CREECH. I see. Have you ever requested any organization, any State or Federal agency, to include such information?

Mr. WILKINS. No, we have not.

Mr. WATERS. Thank you, Mr. Chairman.

Mr. Wilkins, as I understand it, you supported the feature of the bill which refers to the Spanish language by reason of the fact the Spanish language is taught to Puerto Rican students in schools supported by Federal funds.

Is that correct?

Mr. WILKINS. That is true.

Mr. WATERS. And your position is that having been educated in Spanish under Government auspices they ought not thereby be deprived of voting rights.

Is that correct?

Mr. WILKINS. That is the language by which they live, we maintain, and that is the language by which they ought to be able to vote.

Mr. WATERS. And it is your position that if voting rights are exercised, a great many other rights would naturally follow and would not require particular legislation?

Mr. WILKINS. We think, sir, in many cases that would follow; in many cases, but not all.

Mr. WATERS. And you believe that the second section of the 15th amendment stating that Congress shall have power to enforce this article by appropriate legislation, warrants this bill as appropriate?

Is that correct?

Mr. WILKINS. It is our view that it would be appropriate; yes.

Mr. WATERS. And the Attorney General has endorsed such legislation as being constitutional.

Mr. WILKINS. He has so endorsed it, yes.

Mr. WATERS. And he has said that present laws are inadequate?

Mr. WILKINS. As I recall his testimony, but, of course it is general knowledge that the present laws are inadequate.

Mr. WATERS. Thank you, Mr. Wilkins.

Thank you, Mr. Chairman.

Senator ERVIN. On behalf of the subcommittee I wish to thank you for appearing before this subcommittee to give us the benefit of your views and the views of the organization which you represent.

Mr. WILKINS. Thank you, Mr. Chairman.

Senator ERVIN. I would like to put in the appendix of the record letters from the Assistant Attorney General, Burke Marshall, Assistant Attorney General in charge of the Civil Rights Division.

The record of these hearings will be kept open until Monday for the inclusion of other matters. Then it will be closed.

The committee stands in adjournment.

(Whereupon, at 3:20 p.m., the subcommittee adjourned.)

STATEMENT OF SENATOR J. W. FULBRIGHT

U.S. SENATE, April 10, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a statement which I would like to have included in the hearings on S. 2750 and S. 480, currently being held by your subcommittee.

I will appreciate this opportunity to make my views on these proposals known to the subcommittee.

With best wishes, I am

Sincerely yours,

J. W. FULBRIGHT.

STATEMENT OF SENATOR J. W. FULBRIGHT TO SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE U.S. SENATE JUDICIARY COMMITTEE ON THE LITERACY TEST BILLS

Mr. Chairman, I appreciate this opportunity to give the subcommittee my views on the bills to establish a uniform court test of literacy to meet State requirements for voting.

Although the bills differ in several respects, the net result of the enactment of any of them would be the further projection of the Federal Government into the election processes reserved to the States by the Constitution. In view of this, they are, in my opinion, patently unconstitutional.

Under article I, section 2, the establishment of qualifications for voters for election of Members of the House of Representatives is specifically reserved to the individual States. This principle was reiterated in the 17th amendment to the Constitution. The Nation's Founding Fathers and the Congress in proposing the 17th amendment clearly indicated that the voting qualifications prescribed by the States were not to be interfered with at the whim of Congress under pressure from some transient passion.

Contrary to widespread belief, our system of government does not provide for an unqualified right to vote. The right to the ballot in the United States is derived from the laws, constitutional and statutory, of the several States which define the qualifications which must be met by an elector.

The right of the States to require passage of a literacy test as a prerequisite to voting is unquestioned. On numerous occasions the Supreme Court has held this type of qualification to be a proper exercise of State authority. The principle was most recently affirmed in the case of *Lassiter v. Northampton Election Board* decided in 1959 in which the Court said:

"We come then to the question whether a State may consistently with the 14th and 17th amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn v. United States*, *supra*, at 368, disposed of the question in a few words, 'No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted.'"

I will not burden the subcommittee with a recitation of other authorities sustaining this fundamental principle.

The pending bills, if enacted, would impose Federal standards for voting in violation of the constitutional mandate leaving this field to the States. They would, in effect, require the States to accept a fixed Federal criteria for judging the prospective voter's competence regardless of "any examination, whether for literacy or otherwise" called for under State voting laws. There is no constitutional impediment to a State requiring a higher standard than that proposed in these bills or to its demanding the satisfaction of some educational test of a completely different character.

When the 15th amendment was considered by the Congress the version which passed the Senate contained a ban on State discrimination based on nativity, property, and education. The House refused to accept this language and it was deleted in the conference committee which reported the amendment as finally adopted. Literacy tests are educational tests, and the legislative history of the 15th amendment reveals that Congress specifically did not intend to create the constitutional authority which the present bills require. The proponents of these bills must find some other constitutional grounds to support their attempt to invade the rights of the States. I am satisfied that no such constitutional authority exists.

The sponsors of these proposals seek to justify this approach by the inclusion of a legislative finding that State literacy tests have been used to disenfranchise persons who are otherwise qualified to vote. They conclude that such a finding legitimizes a literacy bill under authority of the 15th amendment.

The error in this proposition is that while Congress may be given the authority to legislate to guarantee the equal application of State laws dealing with elections and the qualifications of electors, it is not vested with authority to determine directly the voting requirements a State may establish. In other words, the congressional power to pass legislation to prevent the discriminatory application of State law, does not extend to modification or nullification of State laws which, on their face, are not in violation of the Constitution.

The Congress has recognized this distinction many times. The so-called Civil Rights Acts, passed by the Congress in 1957 and 1960, relate, not to the substance of State election laws, but to the enforcement of such laws. These laws provide additional avenues of redress to the Federal courts for any citizen who is denied a ballot by the discriminatory application of State law. While I took the position that these laws were unnecessary in view of the many constitutional rights statutes already in the books, these two laws do recognize that Federal authority to prescribe directly qualifications for voters does not exist.

The Senate only recently reaffirmed this principle in connection with the proposal to abolish the poll tax which took the form of a constitutional amendment rather than a simple bill. Were the Congress possessed of the power to

deal directly with qualification for electors the cumbersome and uncertain process of constitutional amendment would certainly have been avoided.

Mr. Chairman, my State has no literacy requirements for voting. Arkansas grants the franchise to all persons over 21 years of age who hold a poll tax, meet the residency requirements, and are neither mentally incompetent nor convicted felons. These bills are, however, of considerable importance to my State and to every other State of the Union for their passage would dig the grave for States rights a little deeper. Initial Federal intrusion in the field of voter qualification will be like the nose of the camel under the tent. Soon the whole body will follow until State election laws are superseded by Federal standards and the Federal Government will have usurped another area which the Nation's Founding Fathers left to the States.

The subcommittee has had the benefit of considerable legal research placed before it by Members of Congress, executive officials and others. I do not see how a review of the precedents and authorities, and a regard for fundamental principles enunciated in the Constitution can lead to any conclusion other than that enactment of these bills would violate the Constitution. It is useless to speculate at this time on what attitude the Supreme Court might take on the constitutionality of these measures. Congress is under the same obligation as the Court to observe the mandates of the Constitution, and it would be acting in a highly irresponsible manner if it evaded this duty. The approach being urged by the sponsors of these bills will do violence to our Federal system and will establish a dangerous precedent that can only lead to further erosion of the powers left to the States under the Constitution.

I thank the subcommittee for allowing me to present my views and I hope that it will disapprove these bills.

STATEMENT OF SENATOR THOMAS H. KUCHEL

U.S. SENATE, April 14, 1962.

Hon. SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I regret that it was not possible for me to appear personally before your committee in support of S. 480, which I have coauthored.

I have enclosed a brief statement setting forth my views on this legislation which I would be grateful to have included in the printed committee hearings.

With kindest regards,

Sincerely yours,

THOMAS H. KUCHEL.

STATEMENT OF SENATOR THOMAS H. KUCHEL IN SUPPORT OF S. 480

There are three literacy test statutes receiving consideration before the Subcommittee on Constitutional Rights. I would like to direct my remarks toward one of them, S. 480, of which I am cosponsor along with Senator Javits and others. In brief, the proposal seeks to eliminate by statute the unreasonable test of literacy and establish as qualified all those who have completed six grades of education in a State-accredited school.

The bill is, I believe, necessary for the enforcement of the right to vote. It is, as stated in the bill, "necessary to make effective the guarantees of the Constitution, particularly those of the 14th and 15th amendments, by eliminating or preventing arbitrary and unreasonable restrictions on the franchise which occur through the denial of the right to vote to persons with at least six grades of education and which exist in order to effectuate denials of the right to vote on account of race or color."

It is a fulfillment of the promise made to the American people by the Republican Party in Chicago in 1960 that it would sponsor "legislation to provide that the completion of six primary grades in a State-accredited school is conclusive evidence of literacy for voting purposes." In fact, it has been the general conclusion of both the major parties that the literacy test requirement be altered to meet the broader needs of the people.

S. 480 is in accordance with and pursuant to the civil rights programs initiated by the Republican platform of 1952 and carried forward since that time. The provisions of this legislation are in accord with the specific recommendations of the U.S. Commission on Civil Rights. The statutory approach has been recom-

mended by the chief law officer of the Federal Government, the Attorney General of the United States.

There is a glaring need for the objective and just test of the ability to cast a meaningful vote. I do not refute the autonomy of the State in the conduct of State and local elections. The Federal Government does not intend to usurp the prerogatives of the States in the conduct of elections that do not directly affect the course of Federal action. However, I question letting the State decide, beyond reasonable limits, who shall vote for elected officials on the national level.

Since the first general election of the United States, each State has individually developed its own peculiar set of voting qualifications. These include qualifications for residence in the State, the county, the local district, for age, property ownership, literacy, and a variety of other specifications. Many of these were passed after the 15th amendment went into effect. The passage of that constitutional amendment, as it turned out, in no way precluded the establishment of other voter prohibitions used to circumvent its very restrictions.

One by one the courts have struck down many of the discriminatory statutes, or time and economics have nullified their effects. Remaining, however, is the literacy requirement which, primarily because of its arbitrary and subjective administration, has been a stealthful means of keeping many citizens from the polls.

The literacy test, when administered without discrimination, is a fair and just prerequisite to voting. It is needed for a responsible electorate, on which the whole concept of democracy rests. Voting, while it ought not to be abused, ought to be a privilege that is earned. To cast a ballot is a proud thing, and as a nation we ought to work hard to make that possible for all.

Presently, 20 States—21 if Oklahoma is included—have some sort of literacy requirement as a qualification for voting, ranging from reasonable to unreasonable. My own State of California, for example, has a literacy statute which specifies that a voter be able to read and write English. To be able to read and write our native tongue is by no means an unfair asking.

There are a few States, however, that go so far as to require an interpretation of a given clause or clauses of the Constitution. The scope for interpretation is broad and subjective. Such laws, I doubt, are instituted out of a bona fide belief in the need for an intelligent electorate but to limit the electorate.

The Commission on Civil Rights in its 1961 Report on Voting has made some interesting and revealing observations on voting statistics which I am sure this subcommittee is aware of. Low voter registration in several States, which the Commission discloses, does not necessarily reflect discrimination. The one-party system and low economic status are also hindrances to the exercise of the voting privilege. Other factors, such as residence requirements, also come into the picture. Nonetheless, inferences of discrimination can be made when comparing registration of Negroes with whites in the same voting districts and counties. I think some of my colleagues will find their findings of considerable interest.

Enacting this bill, S. 480, of which I am a cosponsor, will be a step in the direction of overcoming the remaining unreasonable impediments to voting. It is a sad commentary when a country with high educational standards sends illiterates to the polls. It is an even sadder commentary, however, when millions of qualified and literate Americans are kept from the polls each election day because of arbitrary laws. A ban on unreasonable literacy tests is essential to carry out the guarantee of the 15th amendment.

STATEMENT OF JULIUS H. BAGGETT

McCORMICK, S.C., April 11, 1962.

HON. SAM J. ERVIN, JR.,
Chairman, Constitutional Rights Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: The statements of Attorney General Kennedy before your committee on April 10, relative to literacy tests in electoral qualifications, are untrue as to McCormick County, and, indeed, as to the State of South Carolina.

In the first place, it should never be conceded that the Constitution permits the Federal Government to intervene, regulate or control the standards which are established for the electoral privilege, and it must be remembered that, in our democratic society, the exercise of voting is a privilege and not a right. Such a privilege was never guaranteed anyone; otherwise, infants, idiots, criminals and traitors alike would be able to vote.

Your indication that the proposed legislation is unconstitutional is commendable and it is hoped that there will be sufficient astute members of the committee, or of Congress, to prevent passage of the measure because of the constitutional objection.

Notwithstanding the constitutional repugnancy of the proposed legislation, this proposal should perish because of its own lack of merit and its obvious political motives. Our State has very reasonable registration requirements. One must simply be able to read and write a portion of our State Constitution from clearly printed texts furnished the applicant, or must possess and have paid taxes on property having an assessed value of at least \$300. As to this literacy requirement, the test in regard thereto is extremely simple. One without any accredited formal education can pass it. On the other hand, persons with more than 6 years schooling could conceivably fail it for reasons of mental deficiency, poor instruction in school, lack of personal application or any number of reasons.

As Mr. Bloch, of Macon, Ga., said in testifying before your committee, if Congress can arbitrarily peg the literacy qualifications at grade six it could just as easily require a college degree. Ordinarily, one who can read and write, regardless of schooling, should be able to pass our State's requirements.

The statement that literacy tests are used to deprive Negroes of the privilege to vote is false as applied to this county. It is indiscriminately used, as designed, to prevent the ignorant and indigent from voting on matters that vitally affect the enlightened and responsible citizenry. The maintenance of order in society demands that an electorate be capable of understanding the issues and candidates being considered. To permit everyone to vote would be disastrous and no one should suggest it.

The literacy test has never been used by our board to prevent anyone from registering to vote, and very few have failed to pass the test. Our county was thoroughly investigated by the FBI in 1960 on charges of discrimination in voter registration. Though we were never given the decency of a public acquittal, it was admitted, quietly, by the Department of Justice that no action was contemplated. The charges against us were completely false and unwarranted.

Our hope is that Congress will prevent further prostitution of our Constitution and will leave unimpaired the inherent right of South Carolina and of all other States to determine which of its citizens shall have the privilege of voting in all elections, including Federal elections, whatever they are.

Yours very truly,

JULIUS H. BAGGETT,
Member, McCormick County Board of Registration.

STATEMENT OF GENE CRESCENZI

NEW YORK, N.Y., April 16, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Old Senate Office Building,
Washington, D.C.*

HONORABLE SIR: It is absolutely necessary that the administration bill No. 2750 be passed relating to literacy in the Spanish or English language of all persons with 6 grades of schooling. The present English literacy requirement to vote in New York State has the effect of disfranchising over 200,000 citizens who are literate in the Spanish language, because they were raised in the territory of Puerto Rico.

The fact of disfranchisement of these citizens operates to make them subject to all kinds of abuses and denials of the equal protection of the law. More serious than this, a fifth column type of activity has arisen in our governmental agencies and among elected public officials in respect to the disfranchised Puerto Ricans.

In the week of January 2 to 9, 1962, the employees of Flower Hospital went on strike, they are mostly Puerto Ricans earning \$35 to \$40 per week, approximately 35 of these people were beaten and arrested. In this same week the mayor of New York raised his wages \$10,000. On January 17th the General Sessions Court announced that it would require probationers who don't speak English to learn English, as the lack of English was the cause of their problems. I could write volumes on the cruelty, brutality, murder, mayhem and general abuse delivered upon the disfranchised Spanish-speaking citizens in New York by the various agencies of our Government, all of which is directly due to their dis-

for the expression of democratic ideas. We yet like to believe where Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights may be adjudicated in some other forum. Appeal dismissed 326 U.S. 690."

It is noteworthy that in few of the cases cited by the plaintiff has the question of the right to vote been involved. Indeed, they were mostly commercial matters.

POINT III. PETITIONER SEEKS TO RESTRAIN THE ENFORCEMENT AND OPERATION OF THE STATE STATUTE WHICH CONFLICTS WITH FEDERAL LEGISLATION AND THE EFFECT OF WHICH IS TO DENY THE PLAINTIFF THE RIGHT TO VOTE

The matter of *Lassiter v. Northampton Election Board* (360 U.S. 45), which is cited by the defendants, did not more than uphold a literacy test per se, so long as it is fair on its face.

The literacy test in New York is applied to a potential body of population that includes vast numbers of Spanish and other non-English language speaking peoples. There are two daily local Spanish language newspapers, plus other nonlocal daily Spanish language papers which reach the New York community, as well as several radio stations and some television presentations in the Spanish language. There are also numerous other Spanish language periodicals. Furthermore, the present Governor of the State received wide publicity for campaign speeches that he made in the Spanish language.

In *Hanna v. Larche*, 363 U.S. 420, at page 494, the following language appears:

"Only voting qualifications that conform to the standards prescribed by the Fifteenth Amendment may be prescribed."

The petitioner both reads and writes Spanish and is in all respects entirely literate in that language. However, by virtue of the law of the State of New York, McKinney's Election Law, Section 168, he is refused a place on the roll of qualified voters because he cannot read and write English.

It is submitted that these statutes conflict with the existing Federal legislation, specifically 42 U.S.C., Section 1971, Sub-Section a, which reads:

"All citizens of the United States who are otherwise qualified by law to vote at any election by law, by the people in any state, Territory, district, county, city, parish, township, school district, municipality, or other subdivision, shall be entitled and allowed to vote at all such elections, with distinction of race, color or previous condition of servitude, any constitution, law, custom, usage, or regulation of any State or territory, or by or under its authority to the contrary notwithstanding."

The said same statute as amended by the Civil Rights Act of 1957 and the Civil Rights Act of 1960 indicates in the following language at subsection (4):

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any persons has been deprived on account of race or color of any right or privilege secured by subsection (a) the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote. * * *"

The conflict, of course, is also with the Fourteenth and Fifteenth Amendments of the Federal Constitution.

The contention is basically that the requirement of literacy in the English language in New York State in order to vote is a denial of the right to vote based on race.

Petitioner's right to vote as a citizen of the United States is derived from the Federal Constitution, subject to the the state's right to legislate in the area, the Federal Constitution, Article 1, Section 2. The state's legislative powers are restricted by the more general powers vested in Congress, Federal Constitution,

Article 1, Section 4; Article 1, Section 8, Clause 18, *United States v. Classic*, 313 U.S. 299.

Further, although voters' qualification may be the legitimate concern of state legislation, they cannot be so devised as to abridge a citizen's right to vote because of race, color or previous condition of servitude, Federal Constitution, Fifteenth Amendment, *Gibbs v. United States*, 238 U.S. 347. In *Lassiter v. Northampton Election Board*, 360 U.S. 45, the Supreme Court held no more than that a requirement of a literacy test fair on its face was not repugnant to the Constitution. The Court clearly indicated, however, that the literacy test used as a device to permit racial discrimination would not be tolerated.

In the light of these facts, the English language literacy test as a requirement for voting in this particular state becomes specious and works as a device to disenfranchise. Moreover, the racial motive for enacting the law, judging from the debates in the Constitutional convention in the State of New York of 1915, on Pages 3015 and 3016, in support of the proposal for an English language literacy voting requirement, was clearly stated by Mr. Bell:

"Gentlemen, we must stop to think of what we are. This is not a question of nations, it is a question of races, and when all is said and done, there is not a man in this room who dares deny that we are an English race, born and bred and brought up with the traditions of the men of England; of Anglo-Saxon stock."

The petitioner, who is a native of Puerto Rico, also relies on the treaty of Paris, executed the 10th day of December, 1898. Article 9 thereof establishes the guiding principle relating to the civil rights and political status of the inhabitants of Puerto Rico.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

The meaning of the above is clear, that only Congress may legislate with respect to the civil rights and status of the natives of Puerto Rico. This provision has never been changed or superceded, rather it has been implemented in accord with Article 6, Section 1, Paragraph 2, of the Federal Constitution, which states:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under Authority of the United States, shall be the Supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The English language literacy requirement was enacted in 1921 and made effective January 1st, 1922. This was a very trying time during the history of our country, and the meaning of Americanization was confused by many well-meaning American citizens with the use of our English language as our official language, *Meyer v. Nebraska*, 262 U.S. 390—

"* * * One claim put forward is that the statute forwards the works of Americanization. But in our desire for the Americanization of our foreign born population we should not overlook the fact that the spirit of America is liberty and toleration—the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions * * *."

"* * * The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."

That the above has become a guiding norm of our Government and society is further corroborated as we search on to make the rule of just law available to all of mankind through the international body of the United Nations, of which the United States is a member, pursuant to a treaty, and virtue of said treaty, the supreme law of the land, the city of New York must also be guided. Article 55 of the United Nations Charter states in part:

"With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote:

"* * * a.b.c. universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

"Article 56. * * * All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In further implementation of the above, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, Article 2, of which states:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

"Article 21. * * * Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."

"2. Everyone has the right of equal access to public service in his country."

"3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

In *Set Fujii v. State*, 213 Pac. 2nd 595 in reference to the United Nations Charter appears the following:

"The Charter has become the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution to the contrary notwithstanding."

"A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers, it is incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property. * * *"

In the matter of *Oyama v. California*, 332 U.S. 633, in a matter involving the constitutionality of a law of the State of California, which prohibited the acquisition of title to land by persons of the Japanese race, the Court said on Page 673; in striking down the said legislation:

"Moreover, this nation has recently pledged itself through the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion. The alien Land Law stands as a barrier to the fulfillment of that national pledge. It is inconsistent with the Charter, which has been duly ratified and adopted by the United States and is but one more reason why the statute must be condemned * * *"

"* * * And So, in origin, purpose, administration and effect the alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations. It is an unhappy facsimile, a disheartening reminder of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms. Fortunately, the majority of the inhabitants of the United States and the majority of those in California reject the racism and all of its implications. They recognize that under our Constitution all persons are entitled to the equal protection of the laws without regard to their racial ancestry. Human liberty is in too great peril today to warrant ignoring that principle in this case. For that reason, I believe that the penalty of unconstitutionality should be imposed on the alien Land Law."

The United Nations Charter is specific in prohibiting discrimination on the ground of a person's language. The history of language discrimination is indeed a painful one and the law of the State of New York is dangerously similar to the situation which prevailed in Germany in the latter part of the Nineteenth Century. This similarity is in some degree brought out by the following excerpt from the book "*Germanizing Prussian Poland*" by Richard Tims, Columbia University Press, 1941, page 183:

"* * * What they were seeking was nothing less than the complete disappearance of the sight and husking of the sound of the Polish language, not alone from the schools, but from the marketplace as well; in short, from every place publicly frequented by Germans. They wished to see these annoying syllables and suspicious looking words retreat forever into the privacy of Polish homes, there preferably to die out in time, while the language of the ruling nationality entirely occupied the place in the sun. Otherwise the legend

so comforting to nationalist patriots that Germany already was a unified national state, would continue to run head on into irritating exceptions on the very street corners.

"At home inside his four walls and association with his kind the Pole may speak Polish as much as he wishes. But in the whole of civic life, especially in the group, as well as in dealing with the authorities, and in school, it must be a fundamental rule that only the German language shall be used, for we live in a German State."

The concept of equality of American citizens must necessarily preclude the existence of a ruling nationality over and among equal American citizens because of ethnic differences manifested by their different languages.

CONCLUSION

The defendants' motion to dismiss the complaint should be dismissed and the plaintiff's motion for the convocation of a three judge Court should be granted.

Respectfully submitted.

GENE CRESCENZI,
Attorney for the Plaintiff,
320 Broadway, New York, City.

Dated: May 5, 1961.

REPORT BY DEPARTMENT OF COMMERCE ON S. 2979

THE SECRETARY OF COMMERCE,
Washington, D.C., April 3, 1962.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Department of Commerce with respect to section 5 of S. 2979, a bill to further secure and protect the rights of citizens to vote in Federal and State elections.

The views of this Department are confined to section 5 of the proposed legislation.

It would appear that the only practical way for the Bureau of the Census to obtain the information relating to the registration of voters in each State would be by taking a sample of the total population rather than a sample from voter registration records. After such a sample of the population had been completed, these records would be checked against registration records for completeness.

Subsection (2) refers to "any election since January 1, 1960." We believe it would be necessary to have a reference made to specific elections rather than the present language of the bill.

It is assumed that the reference in subsection (1) to "national origin" would have the same meaning as presently used in census statistics; that is, the country of birth of the person enumerated and place of birth of that person's parents.

An estimate on the cost of collecting this information on a single-time basis would run anywhere from \$2.5 to \$5 million. To collect the information as a part of the decennial census would run approximately \$500,000.

We have been advised by Bureau of the Budget that it would interpose no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

EDWARD GUDEMAN,
Under Secretary of Commerce.

APPENDIX

JUSTICE DEPARTMENT INFORMATION CONCERNING VOTING CASES

DEPARTMENT OF JUSTICE,
Washington, March 19, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: This is in response to your letter of March 17, 1962, inquiring on behalf of the subcommittee which of the cases listed in my letter of March 15 involved the use of literacy tests.

It is my understanding that the bill (S. 2750) on which the subcommittee is holding hearings this week is not limited to the abuse of literacy tests as such, but extends also to other and similar performance examinations concerned with testing an applicant's capacity to read, write, or understand or otherwise meet this kind of qualification imposed by a State. An example is the use of a complicated form not as a method of seeking information about an applicant, but as a test to see whether that applicant makes any mistake in filling out the form without assistance.

On this basis, I believe that literacy and other performance tests which would be covered by the bill are involved in the cases designated as Nos. 1, 2, 3, 5, 10, 11, 14-17, 18, 20, 21, 24, and 25. The use of literacy tests was also involved in *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y., 1961), and performance standards may in the future become involved in the cases designated as Nos. 9, 13, 22, and 23 in the list attached to my letter of March 15. Those cases are presently confined to obstacles in making initial applications to register.

If the subcommittee desires any further detail concerning these cases, I would be most happy to furnish it.

Very truly yours,

BURKE MARSHALL,
Assistant Attorney General, Civil Rights Division.

DEPARTMENT OF JUSTICE,
Washington, March 23, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: With further reference to my letters to the subcommittee of March 15 and March 19, 1962, I am enclosing a set of brief memorandums setting forth the status and essential facts or charges in the 25 cases brought under the 1957 and 1960 Civil Rights Acts which were listed in an attachment to my letter of March 15.

I am sure that the subcommittee recognizes that, in the case of the lawsuits which have not come to trial or in which no decision has been rendered, the summaries are of the essential facts which the Government intends to prove. Presumably in each case there will be defenses offered which will give another side of the picture in the particular county.

These materials are being sent to you in accordance with a telephone request of the subcommittee staff. If the subcommittee desires any more information on these cases, I will be most happy to supply it.

Very truly yours,

BURKE MARSHALL,
Assistant Attorney General, Civil Rights Division.

Enclosures.

United States v. Raines et al., Civil Action No. 442 (M.D. Ga.), Terrell County, Ga.

Complaint filed: September 4, 1958.

Motion to dismiss granted: April 16, 1959.

Reversed: February 29, 1960.

Trial: June 27 to July 1, 1960.

Status: Injunction issued September 13, 1960.

This suit, filed under 42 U.S.C. 1971(a), attacked among other things the literacy test as applied by the Board of Registrars of Terrell County, Ga. In February 1960, there were only 53 Negroes registered to vote in the county.

Negro schoolteachers had been denied registration on the ground that they had failed to pass the oral reading test. A Negro applicant with 1 year of college was rejected because the Board determined he could not write legibly. The registrar had dictated at such speed as to make it impossible for the applicant to write the dictation correctly. The court found that Negroes were required to read and write more lengthy and difficult constitutional provisions, that the procedure of testing resulted in an easier test for white applicants than for Negroes, and that a higher standard of literacy was required for Negroes than for white applicants.

United States v. Alabama et al., Civil Action No. 478E (M.D. Ala.), Macon County, Ala.

Complaint filed: February 5, 1959.

Dismissed: March 6, 1959.

Reversed: May 16, 1960.

Amendment and supplemental complaint filed: October 10, 1960.

Trial: February 20, 1961.

Injunction issued: March 17, 1961.

Status: Pending decision in Court of Appeals for Fifth Circuit.

This suit was brought under 42 U.S.C. 1971(a). At the time of the trial only 1,100 of the 11,900 Negroes of voting age were registered to vote in Macon County.

Negro applicants, including many with college degrees, had been denied registration on the ground that they had made technical errors in filling out their application forms. White applicants, including at least one illiterate and others with little or no education, were assisted in filling out their forms and were registered. Applicants were required to copy lengthy portions of the Constitution of the United States ostensibly to prove their literacy. In fact, this phase of the literacy test was used as a means to delay registration of Negroes.

In the year following the issuance of the injunction about 1,000 Negroes have successfully registered in Macon County.

United States v. McElveen et al., Civil Action No. 9146 (E.D. La.), Washington Parish, La.

Complaint filed: June 29, 1959.

Preliminary injunction issued: January 11, 1960.

Stay pending appeal granted: January 21, 1960.

Status: Certiorari granted, stay vacated and judgment affirmed (*U.S. v. Thomas*), February 29, 1960.

This was a suit filed under 42 U.S.C. 1971(a) attacking the validity of a purge from the voter registration rolls of Negro voters but not of white voters similarly situated. The Government's evidence showed that 1,377 or 98 percent of 1,534 Negro voters and only 10 white voters were removed from the voter registration rolls for alleged deficiencies in their application forms. At least 50 percent of the unchallenged applications of white voters had the same defects and deficiencies. The Court ordered that the purged Negroes be restored to the rolls.

United States v. Fayette County Democratic Executive Committee et al., Civil Action No. 3835 (W.D. Tenn.) Fayette County, Tenn.

Complaint filed : November 16, 1959.

Status : Consent judgment entered April 25, 1960.

This action was brought under 42 U.S.C. 1971 (a). The Democratic Party in Fayette County specifically excluded Negroes from primary elections on account of their color. The only significant elections in Fayette County are the Democratic primaries. The suit sought to enjoin the defendants from excluding qualified Negroes from participating in any selection process conducted by them and their successors. A consent judgment to that effect was entered and it is presently operative.

United States v. Association of Citizens Councils of Louisiana et al., Civil Action No. 7881 (W.D. La.), Bienville Parish, La.

Complaint filed : June 7, 1960.

Suit tried : November 16, 1960.

Status : Judgment entered November 3, 1961.

This suit was filed under 42 U.S.C. 1971 (a). In 1956, 560 of 595 Negro voters and 23 of over 5,000 white voters were purged from the voter rolls of Bienville Parish on the ground that they had made mistakes on their original applications for registration. The same types of errors existed on the applications of over 80 percent of the white voters who were not purged. The court ordered that the purged Negroes be restored to the voter registration rolls.

After the purge all Negroes seeking to register or reregister were rejected either on the ground that they could not satisfy the registrar as to their identity or that they could not interpret a section of the Louisiana constitution to the registrar's satisfaction. Less stringent standards were applied to white applicants for registration, who were invariably registered. The court enjoined the registrar from administering the voter qualification laws in a racially discriminatory manner.

United States v. Beaty et al., Civil Action No. 4065 (W.D. Tenn.), Haywood County, Tenn.

United States v. Barcroft et al., Civil Action No. 4121 (W.D. Tenn.), Haywood County, Tenn.

Beaty complaint filed : September 13, 1960.

Beaty complaint amended : November 18, 1960.

Barcroft complaint filed : December 1, 1960.

Temporary restraining order denied : December 2, 1960.

Cases consolidated : December 23, 1960.

Motion for preliminary injunction denied except as to certain defendants : December 23, 1960.

Injunction pending appeal granted : December 30, 1960.

Denial of injunction reversed : April 6, 1961.

Status : Trial set for May 7, 1962.

The complaints in these cases charge that 74 defendants, including individuals, banks, and business associations, conspired to violate and violated the Civil Rights Act of 1957 [42 U.S.C. 1971 (b) (c)]. The complaints allege that the defendants intimidated, threatened, and coerced and attempted to intimidate, threaten, and coerce Negro citizens in Haywood County, Tenn., for the purpose of interfering with the right of the Negroes to vote in Federal elections. The defendants' techniques of intimidation have consisted principally of applying economic pressures of various kinds to Negroes and others. These have included: evictions of sharecroppers and tenant farmers, firings of employees, denials of loans by the banks and credit by the merchants and direct threats.

United States v. Atkison et al., Civil Action No. 4131 (W.D. Tenn.), Fayette County, Tenn.

Complaint filed : December 14, 1960.

Application for temporary order : December 30, 1960.

Defendants agree to be bound by order in *U.S. v. Beaty*, pending trial : April 6, 1961.

Status : Trial date, May 7, 1962.

This case is identical to *United States v. Beaty*, above, in that it charges 81 defendants in Fayette County, Tenn., with intimidating and conspiring to intimidate Negroes for the purpose of interfering with their right to vote in Federal elections in violation of the Civil Rights Act of 1957 [42 U.S.C. 1971 (b) (c)].

United States v. Deal et al., Civil Action No. 8132 (W.D. La.), East Carroll Parish, La.

Complaint filed: January 19, 1961.

Stipulation signed: February 3, 1961.

Status: Motion for preliminary injunction pending indefinitely.

This suit was brought under 42 U.S.C. 1971(b). The complaint alleged that a Negro named Francis Joseph Atlas testified before the U.S. Commission on Civil Rights regarding his efforts to register to vote; that certain cotton ginner and other merchants of East Carroll Parish acting in concert unconditionally refused to gin Mr. Atlas' cotton or conduct ordinary business transactions with him; and that they did so for the purpose of discouraging Mr. Atlas and all other Negroes of East Carroll Parish from registering to vote.

By stipulation the defendants agreed to arrange for the prompt ginning of Mr. Atlas' cotton; for the purchase of his soybeans; and for a supply of butane gas for him.

United States v. Alabama et al., Civil Action No. 1677-N (M.D. Ala.), Bullock County, Ala.

Complaint filed: January 20, 1961.

Trial and partial ruling: March 30, 1961.

Hearing on plaintiff's motion to expedite registration: September 8, 1961.

Status: Judgment for plaintiff, September 13, 1961.

This suit was instituted under 42 U.S.C. 1971(a). At the time of the trial in March 1961, only 5 of the approximately 4,450 Negroes of voting age in Bullock County were registered to vote. The court found that the defendants have perpetuated the existing disparity in voter registration between white and Negro residents of Bullock County by adopting and applying arbitrarily strict and technical standards in grading applications, and by arbitrarily rejecting qualified Negro applicants while registering white applicants no better qualified. The court also found that these and other acts and practices of the defendants have been pursuant to a pattern of racial discrimination.

United States v. Majors et al., Civil Action No. 2584 (S.D. Ala.), Dallas County, Ala.

Complaint filed: April 13, 1961.

Plaintiff's motion under Rule 34: April 13, 1961.

Motion to dismiss: May 10, 1961.

Hearing on motions and order: October 30, 1961.

Status: Trial date May 3, 1962.

This suit was brought under 42 U.S.C. 1971(a). The complaint alleges that only about 156 of the 15,000 Negroes of voting age in Dallas County are registered to vote.

The Government's case will attack the practice of applying different and more stringent standards to Negro than to white applicants for registration in determining whether such applicants are qualified to register and to vote. The four-page application form has been used as a strict literacy examination. Negro applicants who are otherwise qualified, including some Negroes with college degrees, have been denied registration, whereas white applicants less qualified by educational standards have in the past been registered.

The complaint alleges a pattern of discrimination.

United States v. Manning et al., Civil Action No. 8257 (W.D. La.), East Carroll Parish, La.

Complaint filed: April 28, 1961.

Trial: November 27 and 28, 1961.

Status: Briefs filed, awaiting court's decision.

This suit brought under 42 U.S.C. 1971(a) involves the administration of the Louisiana identification requirement. No Negro has been registered to vote in this parish since 1922, although there are more Negroes than white persons

of voting age in the parish. Negro applicants for registration have been required to have two registered voters to identify them. White persons have had no difficulty with the identification requirement, because they are permitted to be identified by their previous registration. Over 95 percent of the white persons of voting age were registered at the end of the last registration period.

United States v. Ramsey, Civil Action No. 1084 (S.D. Miss.), Clarke County, Miss.

Complaint filed: July 6, 1961.

Complaint amended: October 10, 1961.

Status: Hearing on defendants second motion to strike and motion for more definite statement set for March 24, 1962. Motion for preliminary injunction pending.

This case, under 42 U.S.C. 1971(a), attacks the practice of the defendants in refusing to afford Negro citizens the opportunity to apply for registration. In Clarke County 1 Negro of 2,988 of voting age is registered. After the Federal investigation began in this case one persistent Negro, a retired schoolteacher, was allowed to apply for registration and was registered. He made four or five trips to the registrar's office in a period of 4 weeks. He was required to take a literacy examination.

The literacy test is only indirectly involved in this suit. The Government has been seeking since July 6, 1961, by discovery to obtain the registration records in the county to determine what procedures are used, including the literacy examination, to determine the qualifications of white applicants for registration.

United States v. Lynd, Civil Action No. 1616 (S.D. Miss.), Forrest County, Miss.

Complaint filed: July 6, 1961.

Complaint amended: October 10, 1960.

Status: Motion for preliminary injunction heard on March 5, 6, 7, 1962; hearing adjourned to be resumed in latter part of April 1962. No ruling on motion for preliminary injunction.

In Forrest County about 25 of the approximately 7,495 Negroes of voting age are registered to vote. This case, under 42 U.S.C. 1971(a), attacks certain practices of the defendants in the registration process, including the refusal to afford Negroes the opportunity to apply for registration and become registered on the same basis as white applicants, and the application of different and more stringent standards qualifications to Negro applicants than to white applicants in determining their qualifications.

The proof thus far shows that defendants have used the literacy examination for all Negro applicants, who have been allowed to apply. No white applicants were required to take such an examination until January 1961, shortly after the Government filed an enforcement proceeding under title III of the Civil Rights Act of 1960. Prior to January 1961, no Negro (during the present registrar's tenure in office) was allowed to apply for registration. After that time all Negroes who have applied have been given long and difficult provisions of the Constitution to read and interpret. None has been registered.

United States v. Lucky et al., Civil Action No. 8366 (W.D. La.), Ouachita Parish, La.

Complaint filed: July 11, 1961.

Status: Motion to dismiss set for hearing on April 3, 1962.

This suit brought under 42 U.S.C. 1971(a) attacks the validity of a purge of the voter registration rolls in 1956 and challenges the administration of the voter qualification laws since that time. The Government contends that the purge which resulted in a reduction of the number of Negro voters from more than 5,000 to less than 1,000 was aimed at Negro voters but not at white voters similarly situated. In addition the Government will show that since 1956 the registrar of voters has applied different and more stringent standards to Negro applicants than to white applicants in the administration of the voter qualification laws including the testing of applicants on their ability to read and interpret provisions of the Louisiana and U.S. Constitutions. About 5 percent of the Negroes of voting age are registered.

United States v. George Penton et al., Civil Action No. 1741-N (M.D. Ala.),
Montgomery County, Ala.

Complaint filed : August 3, 1961.

Trial : January 3-10, 1962.

Status : Trial brief submitted ; awaiting judgment.

This suit was brought under 42 U.S.C. 1971(a). Only 3,766 of the 33,000 Negroes of voting age in Montgomery County were registered as of December 15, 1961.

The Government introduced evidence to show that between January 1, 1956, and June 16, 1961, the board registered 96.6 percent of the white persons who applied, while rejecting 75.4 percent of the applications filed by Negroes. Included among these Negroes were 710 who had 12 or more years of formal education and who together filed over 1,200 applications. Their applications were rejected by the board on the ground that they did not "properly" fill out their application forms. The Government produced evidence to show that the board has used the application form as a literacy test or examination for Negroes but not for white persons.

United States v. Daniel, Civil Action No. 1655 (S.D., Miss.), Jefferson Davis
County, Miss.

Complaint filed : August 3, 1961.

Complaint amended : December 18, 1961.

Status : Pending motions : Defendant's second motion to strike and motion for more definite statement ; plaintiff's motion for production of records under rule 34 and motion for preliminary injunction. No hearing date set.

In Forrest County approximately 120 of the 3,222 Negroes of voting age are registered to vote. In that county prior to 1956 approximately 1,200 Negroes were registered voters. In 1956 the board of supervisors ordered a reregistration of all voters. This case attacks certain practices of the defendants in registration process which have been used since the reregistration was ordered. Principally, the case seeks to enjoin the use of different and more stringent standards for Negro applicants than for white applicants in administering the literacy examination. We have listed in the complaint about 40 Negroes who have made one or more unsuccessful attempts to register. Many of these persons who have been rejected after taking the literacy examination would appear to possess the intelligence to pass a fairly administered literacy test because of their education background.

United States v. State of Mississippi, Civil Action No. —?— (S.D., Miss.),
Walthall County, Miss.

Complaint filed : August 3, 1961.

Status : Motion for preliminary injunction filed September 21, 1961. No hearing date set.

In Walthall County no Negroes of the 2,490 Negroes of voting age are registered. This case, under 42 U.S.C. 1971(a), involves the use of different and more stringent standards in administering the literacy examination to Negro applicants than are used in administering such examination to white applicants. For example, one of the affidavits attached to the motion for preliminary injunction was executed by a senior college student majoring in political science. The affidavit indicates she was rejected on failure to complete the literacy examination to the registrar's satisfaction.

The suit also involves recent conduct on the part of the registrar in refusing to accept applications for registration of Negroes.

United States v. Wood et al., Civil Action No. 1670 (S.D., Miss.) Walthall
County, Miss.

Complaint filed : September 20, 1961.

Application for temporary restraining order : Filed September 20, 1961.

District court : Denied temporary injunction, September 21, 1961.

Court of appeals : October 27, 1961, reversed.

Status : Pending in Supreme Court on petition for certiorari.

This suit was brought under 42 U.S.C. 1971(b) to enjoin intimidation of Negro citizens by the registrar, sheriff, city attorney, and district attorney of Walthall County by use of the State criminal process. The Government's affi-

avits in support of its motion for a temporary restraining order stated that a Negro, who was conducting a registration school in Walthall County, was ordered by the registrar at gunpoint out of his office when he accompanied two Negroes to that office to register. He was hit on the head with the gun and subsequently was arrested by the sheriff. The court of appeals ordered that his prosecution be enjoined pending hearing in the district court.

United States v. Fox et al., Civil Action No. 11625 (E.D., La.), Plaquemines Parish La.

Complaint filed: October 16, 1961.

Status: No trial date set.

This suit brought under 42 U.S.C. 1971(a) attacks the administration of the Louisiana literacy and interpretation tests. Less than 2 percent of the Negroes of voting age in the parish are registered, while over 75 percent of the white persons of voting age are registered.

The Government plans to show that approximately 85 percent of the white applicants have been given relatively simple provisions of the State and Federal Constitutions to read and interpret, while over 90 percent of the Negro applicants have been given different and more difficult tests. In addition, the Government contends that white applicants but not Negroes have been given assistance in completing the registration process and that in the past the registrars have not made themselves accessible to Negro applicants, but have visited the homes of white persons and there taken their applications.

United States v. Duke, Civil Action No. D-C-45-61 (N.D., Miss.), Panola County, Miss.

Complaint filed: October 16, 1961.

Status: Defendants motion to strike out and motion for more definite statement pending. No hearing date set.

In Panola County, about 10 of the 7,250 Negroes of voting age are registered. Over 5,000 of the 7,639 white persons of voting age are registered. The Government's case under 42 U.S.C. 1971(a) attacks the use of different and more stringent standards in administering the literacy examination to Negro applicants than in administering such examination to white applicants.

United States v. Ward et al., Civil Action No. 8547 (W.D. La.), Madison Parish, La.

Complaint filed: October 26, 1961.

Status: No trial date set.

This suit brought under 42 U.S.C. 1971(a) involves the administration of the Louisiana identification requirement. No Negro has been registered to vote in this parish since 1900, although there are more Negroes than white persons of voting age in the parish. The Government will show that Negroes are kept from applying for registration by the requirement that they have two registered voters to identify them, and that white persons are not burdened with this requirement because they are permitted to be identified by their previous registration. Over 80 percent of the white people of voting age were registered to vote at the end of the last registration period.

United States v. Dogan, Civil Action No. D-C-53-61 (N.D. Miss.), Tallahatchie County, Miss.

Complaint filed: November 17, 1961.

Motion for preliminary injunction: Hearing December 13, 20, 21, 22, 1961.

Status: Court denied motion for preliminary injunction. Government appealed to fifth circuit; brief in preparation.

This case, under 42 U.S.C. 1971(a), attacks both the procedures by which the sheriff received poll taxes from Negroes, and the refusal by the registrar to afford Negroes the opportunity to apply for registration. In this county no Negroes of the 6,483 Negroes of voting age are registered.

The hearing on the preliminary injunction involved only the poll tax aspect of this case. The registration claim will presumably be heard after disposition of the case by the court of appeals. This claim, in the Government's view is-

volves a purposeful refusal by the registrar to permit Negroes to apply for registration. Under these circumstances the literacy examination is only indirectly involved because no Negroes have been allowed to take the examination. The literacy examination is relevant, however, in determining what procedures are used with respect to white applicants who apply for registration.

United States v. Louisiana et al., Civil Action No. 2548 (E.D. La.), State of Louisiana

Complaint filed : December 28, 1961.

Motion to dismiss filed : February 27, 1962.

Amended complaint filed : March 15, 1962.

Status : Awaiting responsive pleading.

This suit was brought under 42 U.S.C. 1971(a) seeking to enjoin the enforcement of the Louisiana interpretation test as a voter qualification test on the ground that this test is unconstitutional. The Constitution and statutes in Louisiana require as a voter qualification that applicants for registration be able to understand and give a reasonable interpretation of any section of the Constitution of the United States or of the constitution of Louisiana.

The Government's position is that the history and setting in which the interpretation test was adopted and has been enforced and the uncontrolled discretion which is vested in registrars who administer the test render it unconstitutional under 42 U.S.C. 1971, and under the 14th and 15th amendments.

United States v. Wilder et al., Civil Action No. 8695, Jackson Parish, La.

Complaint filed : February 21, 1962.

Status : No trial date set.

This suit was brought under 42 U.S.C. 1971(a). The Government will show that Negro voters were purged from the voter registration rolls in 1956 for errors on their application forms, but white votes, whose applications contained the same or similar errors, were not purged. In addition, the Government contends that since 1956 the registrar of voters has applied different and more stringent standards to Negro applicants than to white applicants in the administration of the voter qualification laws, including the testing of applicants on their ability to read and interpret provisions of the Louisiana and U.S. Constitutions. More than 80 percent of the white persons and less than 20 percent of the Negroes of voting age are registered to vote in this parish.

DEPARTMENT OF JUSTICE,
Washington, March 30, 1962.

HON. SAM J. ERVIN, JR.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your letter of March 23, 1962, requesting certain information in connection with forthcoming hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, on S. 480, S. 2750, and S. 2079. You ask for the number of criminal cases which have been instituted against election officials for the wrongful refusal to register prospective voters since January 1, 1950, and particularly any cases which may have been brought as a result of the application of a literacy test.

The statistical records of the Department, unfortunately, are not broken down in such a fashion as to permit a statistical breakdown of presentations to grand juries by subject matter. I have, however, made every effort to get as complete information as possible. Based upon the records that are available and the recollection of the lawyers in the Department who worked in this area from 1950 until the enactment of the Civil Rights Act of 1957, it appears that presentations on voting matters were made during that period to three grand juries. Two were made in Mississippi and one in Louisiana.

The two matters in Mississippi were presented in 1952 and 1953. These involved simple refusals to register Negroes. The grand juries did not return indictments.

The grand jury in Louisiana was convened in December 1956 to consider purges from the voting rolls in six parishes in Louisiana. These purges were based in part on mistakes in filling out the forms used in Louisiana. To that extent they involved the use of a performance test, the administration of which would be affected by the bills under consideration.

The Louisiana grand jury also failed to return indictments. This matter was discussed in the hearings before the subcommittee prior to the enactment of the 1957 statute.

While it is impossible to be sure, because of the manner in which our records are kept, I am quite confident that these are all the voting matters which have been presented on the criminal side since 1950. None has been presented since the passage of the 1957 act.

Very truly yours,

BURKE MARSHALL,
Assistant Attorney General, Civil Rights Division.

OPINIONS OF STATE ATTORNEYS GENERAL ON THE PENDING BILLS

LETTER FROM SENATOR SAM J. ERVIN, JR., SUBCOMMITTEE CHAIRMAN, REQUESTING OPINIONS OF STATE ATTORNEYS GENERAL

FEBRUARY 5, 1962.

DEAR MR. ATTORNEY GENERAL: The Senate Subcommittee on Constitutional Rights is presently considering two bills relating to literacy requirements as conditions for voting. One of these is S. 2750, the administration bill, and the other is S. 480, introduced by Senator Javits. It is anticipated that public hearings on these bills will be held in March.

In view of the possible effect of these bills on State laws, it would be of great assistance to the subcommittee to have your opinion as chief law enforcement officer of your State, on the constitutionality and desirability of these measures.

As you will note, S. 2750 proposes various congressional findings regarding the right to vote; the denial of that right to some persons; the sufficiency of a sixth grade education as basis for a literacy requirement; the lack of proficiency in English as ground for denial of the franchise; and the power of Congress, under article I and the 14th and 15th amendments of the Constitution, to legislate on these matters.

Section 2 of S. 2750 would amend section 1971, title 42, United States Code, which provides for preventive judicial relief when a person is arbitrarily deprived of his voting rights. In connection with the right to vote for national officers, the bill in effect adds as grounds for such court action: (1) the application to any persons of standards or procedures more stringent than are applied to others similarly situated; and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if that person has not been adjudged incompetent and has completed the sixth primary grade of any public or accredited private school in any State or territory, the District of Columbia, or Puerto Rico.

S. 480 contains similar provisions which would apply to all elections, State as well as Federal.

Provisions of the Constitution, as you know, spell out the power of the States to establish voter qualifications. Under article I, and the 17th amendment, the electors for Senators and Congressmen in each State "shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." Under article II and the 12th amendment, the President and Vice President are to be elected by electors who must be chosen in each State "in such Manner as the Legislature thereof may direct."

Numerous decisions by the U.S. Supreme Court in such cases as *Pope v. Williams* (193 U.S. 621) and *Mason v. Missouri* (179 U.S. 328) have upheld the broad powers of the State to determine the conditions under which the right of suffrage may be exercised. Three years ago the Supreme Court, in *Lassiter v. Northampton Election Board* (360 U.S. 45), ruled that a North Carolina literacy test applicable to all voters irrespective of race or color was constitutional under the 14th and 17th amendments. In its unanimous opinion, the Court cited its ruling in *Guinn v. U.S.* (238 U.S. 347) that the establishment of a literacy test "was but the exercise by the State of a lawful power vested in it not subject to our supervision."

In your opinion, can the provisions of the bills before the subcommittee be reconciled with these holdings and with the applicable provisions of the Constitution? On a related issue, the subcommittee would also be interested in your comments on the constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently.

The subcommittee will appreciate receiving, prior to the beginning of the hearings, the benefit of your views regarding these questions. It would also appreciate authorization to insert your expression of views in the printed record.

Thanking you for your assistance in our study, and with all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, Jr., *Chairman.*

LETTER FROM SENATOR SAM J. ERVIN, JR., SUBCOMMITTEE CHAIRMAN,
REQUESTING FURTHER OPINIONS FROM ATTORNEYS GENERAL AND
CONSTITUTIONAL-LAW PROFESSORS

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
March 23, 1962.

DEAR ———:

In connection with my previous letter concerning the subcommittee's forthcoming hearings on S. 480 and S. 2750, I am enclosing a copy of S. 2979, which also pertains to voter qualifications. This bill was referred to the subcommittee yesterday and will be considered at the hearings.

The subcommittee will appreciate your supplementing your original statement with comments on S. 2979, so that your views on each of the bills, pertaining to this subject, might be made a part of our record.

With all kind wishes, I am,

Sincerely,

SAM J. ERVIN, Jr., *Chairman.*

ALASKA

JUNEAU, *March 8, 1962.*

HON SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This refers to your letter of February 7, 1962, to me, in which you ask for our review of two bills relating to literacy requirements as conditions for voting—S. 2750, the administration bill, and S. 480, introduced by Senator Javits.

I regret that we have been unable to prepare our remarks prior to this time. I hope that our remarks will reach you in sufficient time for the hearing.

You have specifically requested whether, in my opinion, the provisions of the bills before the subcommittee can be reconciled with the provisions of the Federal Constitution.

The question posed is a highly complex one. Article I, section 2 of the Constitution provides that, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The 17th amendment prescribes the same voting requirements for election of Senators. Under these provisions, a citizen has what might be termed a conditional right to vote. The State first prescribes requirements to establish who shall vote for the most numerous body of its State legislature. Once the voting class of persons is determined, they also receive a constitutional right to vote in Federal elections. Their constitutional right is entirely dependent upon the State requirements. *Ex parte Yarbarough*, 110 U.S. 651, at 656. There is no Federal authority granted or implied under these sections as would enable the Government to establish conditions on the exercise of the franchise. This authority is exclusively delegated to the States.

However, the States cannot use their power without certain limitations. In particular, the 15th amendment to the U.S. Constitution states that no State shall deny suffrage on the basis of race and further grants the Congress the

power to enforce the amendment by appropriate legislation. The most obvious way in which Congress might enforce such an amendment is to simply prescribe penalties for persons acting under color of State law who deny suffrage on the basis of race. However, this possible solution does not necessarily preclude a different approach. In particular, faced with a myriad of varying literacy tests, Congress might act to prescribe a uniform literacy test in an effort to insure that State literacy tests were not used in a discriminatory manner. The one difficulty with this analysis is that the Supreme Court has recently determined that literacy tests imposed by States are not *prima facie* discriminatory. *Lassiter v. Northampton Election Board*, 360 U.S. 45. A congressional assumption, therefore, that literacy tests are being used in a discriminatory manner requiring congressional action, while not in direct contrast to the Court's finding, would at least make a Federal assumption of power that the Court presently views as unnecessary.

Assuming the invalidity or discriminatory application of a State literacy test, an individual is always free to contest that requirement in court. Cf. *Nixon v. Condon*, 286 U.S. 73 (1932). However, while a remedy might exist, it is not always necessary that that remedy be the only one. Congress might decide that a judicial proceeding undertaken by individuals is too time consuming and costly and that the only way of insuring proper compliance with the 15th amendment would be through the means of a federally imposed uniform literacy test. This is a close question and I would not wish to make any definite conclusion on it at this time. I should say that I have found no case which is even remotely on point.

You have also asked our opinion as to the constitutionality of creating a legal presumption that completion of a sixth grade education is of itself proof of literacy for the purpose of voting. Assuming that any Federal legislation setting literacy standards is valid (an assumption difficult to make with assurance), it would follow that this presumption would itself be valid. It is a presumption supported by logic, and while a sixth grade education is not always conclusive evidence of literacy, the proposal does not, to my knowledge, seek to make the presumption conclusive. If in the area of criminal law, where legislative standards are strictest and presumptions generally minimized, the Supreme Court will uphold a logical presumption, I assume the same analysis will hold true in the matter of elections. Cf. *Tot v. United States*, 319 U.S. 463.

If the views expressed herein would be helpful, there is no objection to your inserting them in the printed record.

Sincerely yours,

RALPH E. MOODY,
Attorney General.

CALIFORNIA

SACRAMENTO, March 28, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SIR: We have received your letter dated February 7, 1962, wherein you request our opinion on the constitutionality and desirability of two bills, S. 2750 and S. 480, copies of which accompanied your letter. We regret that the stress of urgent State business has prevented an earlier reply and has precluded our rendering a formal opinion regarding these bills. However, we are happy to provide you with our informal views regarding the following two questions presented in your letter:

1. Whether the provisions of the bills before the Subcommittee on Constitutional Rights can be reconciled with several holdings by the U.S. Supreme Court sustaining literacy tests and with the applicable provisions of the Constitution.
2. Whether the creation of a presumption of law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently is constitutional.

Before presenting our views on the first question, we must look at the provisions of these bills. In essence, S. 2750 provides that no person shall be denied the right to vote in any Federal election on account of his performance in any examination, if such person has not been adjudged incompetent and has completed the sixth grade. S. 480 provides that all citizens of the United States, otherwise qualified to vote at any election, shall be entitled to vote without sub-

jection to any requirement designed to determine literacy, comprehension, intelligence or other tests of education, knowledge, or understanding in the case of any citizen who has not been adjudged an incompetent and who has completed the sixth grade.

In brief, it is our view that neither of these measures is constitutional because of the absence of power in Congress to enact such legislation. Both measures propose an eradication of literacy tests in the case of a competent person who has received a sixth grade education. Since literacy tests have generally been held to be valid, analysis requires a determination of the source of this power of eradication.

Regarding S. 2750, this power cannot be found under article I, section 4 of the Constitution. The Constitution adopted, as the qualifications of electors for Members of Congress, those prescribed by the State for electors of the most numerous branch of the State legislature (*Swafford v. Templeton*, 185 U.S. 487). The qualification of the voter is determined by the law of the State where he votes (*Ex parte Yarbrough*, 110 U.S. 651). These cases point out that the Constitution confers upon a State the sole power to determine the qualifications of voters therein; the Federal Government has no power to determine qualifications of voters in Federal elections. Therefore, article I, section 4, gives Congress no power, the exercise of which would supersede any measures enacted by States under article I, section 2, and the 17th amendment.

Nor does Congress have any power, as such, to determine qualifications of voters in any election. "The States, not the Federal Government, prescribe the qualifications for the exercise of the franchise" (*Davis v. Schnell*, 81 F. Supp. 872, *aff'd* 336 U.S. 933). The conditions under which the right of suffrage is to be exercised are matters for the States alone to prescribe (*Pope v. Williams*, 193 U.S. 621).

If Congress has no power to determine qualifications of voters, then the power of eradication must be found in the protecting powers of section 5 of the 14th amendment and section 2 of the 15th amendment.

The mere requirement of a literacy test does not violate the equal protection clause or the 15th amendment (*Lassiter v. Northampton Election Board*, 360 U.S. 45, *Guinn v. United States*, 328 U.S. 347). Nor does the mere requirement of such a test violate the due process clause (*Franklin v. Harper*, 205 Ga. 779, appeal dismissed 339 U.S. 946).

Therefore, since the mere requirement of a literacy test does not violate either of the above amendments, and the rights therein given to persons are not violated, Congress is exceeding the scope of the protecting powers by eradicating that which does not constitute prohibited "State action." Thus Congress has no power of eradicating literacy tests by virtue of the protecting powers conferred by these amendments.

Concerning the question of the constitutionality of the creation of a legal presumption of literacy, it would seem that such presumption would be constitutional because of the close correlation between the facts on which the presumption is based and the fact presumed. However, the creation of such a presumption by Congress would not be valid. Since Congress has no power whatsoever to determine the qualifications of voters, Congress has no power to substitute its judgment for that of the States. Thus Congress has no power to put a presumption of literacy in the place of a test to determine the existence of literacy.

We hope that this informal expression of our views has provided some assistance to the subcommittee in its study.

Very truly yours,

STANLEY MOSK.

Attorney General.

CHARLES A. BARRETT,

Assistant Attorney General.

CONNECTICUT

HARTFORD, March 22, 1962.

HON. SAM J. ERVIN, Jr.,

*Chairman, Committee on the Judiciary, Subcommittee on Constitutional Rights,
U.S. Senate, Senate Office Building, Washington, D.C.*

DEAR SENATOR ERVIN: In your letter dated February 7, you requested my opinion with regard to the constitutionality and desirability of two proposed bills under consideration by your committee relating to literacy requirements as conditions for voting, being S. 2750 and S. 480.

My own experience with regard to this matter and inquiries which I have made after receiving your letter reveal that this is not a problem in Connecticut since an individual who has completed the sixth grade of any public, parochial, or accredited private school would have no difficulty in meeting the reading qualification prescribed under our Connecticut constitution.

However, I shall be happy to look into the problems which you raised in your letter.

Very truly yours,

ALBERT L. COLES, *Attorney General.*

FLORIDA

TALLAHASSEE, February 12, 1962.

Re Federal legislation prohibiting illiterates from voting.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I have studied and given considerable thought to your letter of February 7, 1962, concerning Federal legislation regulating the privilege of voting by illiterates and pursuant to your request, offer the following observations which you may insert in the printed record if you desire.

It has long been my impression, and it seems well founded in law, that the right of suffrage is not conferred by the Federal Government but is generally derived from the separate States under State constitutions. See 18 Am. Jur. 21, Elections, section 45 et seq.; 11 Fla. Jur. 350, Elections, section 12 et seq.; 29 C.J.S. 25, Elections, section 5, et seq. This being the case, there comes to mind a serious question as to the appropriateness of Federal legislation attempting to provide for regulations in this area.

To further complicate matters, the constitution of the State of Florida, while specifically denying several classes the privilege of registering to vote (see article VI, section 5) makes no reference to literacy except those declared insane by a court of competent jurisdiction as a basis for such an exclusion. It is a general rule of statutory construction followed by the courts of Florida that where certain specific inclusions are made in the law, those things not specifically included were intended to be excluded under the doctrine of *expressio unius est exclusio alterius*. *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341; *Alsop v. Pierce*, 19 So. 2d 799, 155 Fla. 184; *Ideal Farms Drainage Dist. v. Certain Lands*, 19 So. 2d 234, 154 Fla. 554; *In re Ratliff's Estate*, 188 So. 128, 137 Fla. 229.

Thus, there appears to have been no intention on the part of the framers of the constitution of the State of Florida to consider literacy as a prerequisite to registering to vote.

Furthermore, the Florida courts have held that where the constitution has prescribed the qualifications of electors, the State legislature is powerless to enact legislation modifying such qualifications. (See *State ex rel. Lamar v. Dillon* (1893) 32 Fla. 545, 14 So. 383, 22 L.R.A. 124; *Riley v. Holmer* (1930) 100 Fla. 938, 131 So. 330; *Thomas v. State* (1952) Fla., 58 So. 2d 173, 34 A.L.R. 2d 140.)

Literacy not now being a qualification for voting in Florida under the State constitution, the legislature has provided for illiterates to vote (see sec. 101.48, Florida Statutes), thus establishing a public policy for this State in favor of permitting illiterates to vote. While the State legislature might repeal this provision, it would, under the authorities cited above, appear powerless to enact legislation implementing the proposed Federal legislation prior to an appropriate amendment of the State constitution which would require an overt act on the part of the people of Florida.

Trusting these observations may be useful to your committee in its deliberation on the question discussed herein, I remain

Sincerely,

RICHARD W. ERVIN, *Attorney General.*

ILLINOIS

SPRINGFIELD, February 14, 1962.

File No. 223.

Elections: Qualifications of Illinois electors, literacy requirement.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: I have your communication of February 7, 1962, enclosing printed copies of S. 2750 and S. 480, both bills relating to literacy requirements of electors and the sufficiency of a sixth grade education as meeting the requirement.

The Illinois constitutional provision relating to the qualifications of electors is found in article VII, section 1, and is as follows:

"Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord one thousand eight hundred and forty-eight, or obtained a certificate of naturalization, before any court of record in this State, prior to the first day of January, in the year of our Lord one thousand eight hundred and seventy, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election."

(Since the adoption of the 19th amendment of the Constitution of the United States, women are entitled to vote the same as men.)

Section 7 of said article VII provides that the general assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes.

Our supreme court, in construing section 1 supra, in the case of *People v. Hoffman*, 116 Ill. 587, held that the legislature could not add to or increase the qualifications of electors as set forth in the constitution. This case involved the constitutionality of a registration act and the court, in its opinion, pointed out that registration was not an additional qualification, but was merely a means to determine whether the elector possessed the necessary constitutional qualifications.

Other cases holding that the general assembly cannot increase or add to constitutional qualifications are *People v. McCormick*, 261 Ill. 413, *People v. Board of Election Commissioners*, 221 Ill. 9, and *Bardens v. Judges Retirement System*, 22 Ill. 2d 56.

Under article I and the 17th amendment of the Constitution of the United States, the electors for Senators and Congressmen in each State "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Under article II and the 12th amendment, the President and Vice President are to be elected by electors who must be chosen in each State "in such manner as the legislature thereof may direct."

It is apparent that, under the Illinois constitution, there can be no literacy requirement of electors, and, for that reason, I do not care to speculate on the question of the constitutionality of said proposed bills as applied to other States.

Very truly yours,

WILLIAM G. CLARK, *Attorney General.*

INDIANA

INDIANAPOLIS, March 14, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Your letter dated February 7, 1962, addressed to Edwin K. Steers, attorney general, was referred to the undersigned for reply and study.

Please be advised that the late acknowledgment of your letter, which I regret, should not be interpreted as a lack of interest in the subject matter thereof.

I have read Senate bills S. 2750 and S. 480, attached to your letter, with considerable interest and have made a cursory examination of our laws which might have a bearing upon your questions.

If, after a more complete study of the matters involved, this office is able to contribute any substantial information which may be of value to your subcommittee, the same will be forwarded to you.

Respectfully yours,

ADDISON M. DOWLING,
Chief Counsel, Office of the Attorney General.

KENTUCKY

FRANKFORT, February 21, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senator,
Chairman, Subcommittee on Constitutional Rights,
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your letter of February 7 in which you state that the Senate Subcommittee on Constitutional Rights is presently considering two bills relating to literacy requirements as conditions for voting. In view of the possible effect of these bills on State laws you, on behalf of the subcommittee, request my opinion concerning the constitutionality and desirability of these two bills.

The Commonwealth of Kentucky has no literacy requirements for voting and in fact provision is made to assist illiterate voters in casting their votes at the polls. Thus the two proposed bills before the Senate subcommittee would have no effect on voting requirements in Kentucky.

Section 145 of our constitution prescribes the qualifications for voting and for your information reads as follows:

"Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.

"1. Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

"2. Persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense.

"3. Idiots and insane persons."

Section 147 of our constitution authorizes our general assembly to require all qualified voters to register. The legislature has implemented this constitutional authorization by the enactment of Chapter 117 KRS. Thus in Kentucky when a person possesses the qualifications enumerated in section 145 of our constitution quoted above, he is entitled to vote providing he signs a registration card in the office of the county court clerk of the county in which he resides.

The case of *Lassiter v. Northampton Election Board* (360 U.S. 45, 79 SCT 985), recites the fact that the Federal Constitution delegates to the State the power to determine the conditions under which the right of suffrage may be exercised and further, that the courts will not interfere as long as such conditions are reasonable and apply equally to all persons regardless of race, creed, or color. This case further upholds the State requirement of a literacy test so long as it is fair on its face. Thus in view of the Supreme Court's decision and the referred-to case, the proposed bills, which attempt to set up literacy requirements as conditions for voting in face of the constitutional delegation of such authority to the various States, would appear to be invalid. It would also appear that the best proof of literacy would be the ability to read and write, rather than the mere fact that the voter completed a sixth grade education.

Yours very truly,

JOHN B. BRECKINRIDGE,
Attorney General.

LOUISIANA

BATON ROUGE, March 1, 1962.

HON. SAM J. ERVIN, JR.,

U.S. Senate, Subcommittee on Constitutional Rights, Committee on the Judiciary, Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Receipt of your good letter dated February 7, 1962, is hereby acknowledged. The subject matter on which you have asked my advice, I consider of the very greatest importance.

I am of the opinion that Senate bill 2750, as well as Senate bill 480, are unconstitutional. I transmit herewith memorandums in support of this view.

Basically, I submit that this matter is expressly reserved to the individual States by the U.S. Constitution and consequently, there is not only no constitutional authority for the Congress to entertain and pass such legislation, but there is the express reservation in the Constitution which is in direct conflict with any such presumed authority.

Absent such authority in the Constitution, such of necessity would have to be established by constitutional amendment in the same manner the 15th amendment was adopted and the 19th amendment was adopted. Certainly both of these amendments dealing with Negroes and the feminine sex, respectively, establish constitutional rights theretofore nonexistent in the province of suffrage.

I firmly feel that for the Congress to entertain such legislation, the U.S. Constitution would have to be amended so as to establish authority for the Congress so to do.

I would appreciate it very much indeed if you would keep me posted and advised as to the progress of this legislation before the committee and the Congress.

I subscribe entirely to the views expressed by one of the great believers in centralized power, Alexander Hamilton, in the Federalist No. 59 (Feb. 22, 1788) when he explained the reason for the power to regulate elections remaining in the States, as follows:

"Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an *unwarrantable transposition of power*, and as a *premeditated engine for the destruction of State governments?*" (Emphasis mine.)

If I can be of further assistance to you, through testimony before your committee or otherwise, please do not hesitate to call.

Accept herewith my authorization to insert any or all of my expression in the record.

Sincerely,

JACK P. F. GREMILLION,
Attorney General.

NEW ORLEANS, March 5, 1962.

HON. SAM J. ERVIN, JR.,
U. S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: Reference is made to your letter of February 7, 1962, and my reply thereto under date of March 1.

Please find enclosed a supplemental memorandum dealing with the constitutionality of Senate bill No. 2750 and Senate bill No. 480.

With best wishes, I remain,

Cordially,

JACK P. F. GREMILLION,
Attorney General.

Enclosure.

MEMORANDUM ON LITERACY LEGISLATION

Any Federal legislation affecting the voting field must find its source in the U.S. Constitution.

One of the fundamental sources of national power is article 1, section 4, which provides: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

While Congress has legislated a few times under this grant of authority, there is still considerable doubt as to the extent of the power, particularly with reference to the term "Manner" as used in the above section. See *Newberry v. United States*, 41 S. Ct. 469, 256 U.S. 232, 65 L. Ed. 913; Note, 46 Virginia Law Review 945, 949.

Article 1, section 2 of the Federal Constitution provides that those electors who are qualified to vote for the largest State legislative body shall elect the Representatives to Congress. Pursuant to this section, States have established requirements for the exercise of suffrage, most of which have been upheld by the U.S. Supreme Court.

Never in the history of this Nation has there been universal suffrage. It has always been understood that States could establish reasonable restrictions on the right to vote. See Note, 46 Virginia Law Review 945, 949; 47 American Bar Association Journal 251 (March 1961).

Suffrage and citizenship are not the same. Suffrage is not one of the inherent or natural rights given to man by his Creator; nor is it a right of property or an absolute personal right. Suffrage is in all respects a conventional right, a gift of the State, subject to be taken away or withheld by the power of the State.

Anderson v. Baker, 23 Md. 531; *Cooley*, Const. L. 276, 277; *Gougar v. Timberlake*, 148 Ind. 38, 37 L.R.A. 644, 62 Am. St. Rep. 487, 46 N.E. 339, Black, Const. Law, 644; Story Const. sec. 581; note to *State ex rel Allison v. Blake*, 25 L.R.A. 480; 12 American Jurisprudence, Verbo Constitutional Law, Section 466.

Before the 14th and 15th amendments the entire control of the elective franchise belonged exclusively to the several States, and the right or privilege of voting was (as it still is) one arising under the constitution of each State, and not under the Constitution of the United States.

Anderson v. Baker, 23 Md. 623; *Cooley*, Const. L. 277; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N.E. 916; *Stone v. Smith*, 159 Mass. 413, 34 N.E. 521; *Gougar v. Timberlake*, 148 Ind. 38, 37 L.R.A. 644, 62 Am. St. Rep. 487, 46 N.E. 339; 16 Albany L. J. 272; *United States v. Anthony*, 11 Blatchf. 202, Fed. Cas. No. 14,459; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Mason v. Missouri*, 179 U.S. 328, 45 L. Ed. 214.

Since the adoption of the 14th and 15th amendments, the power to regulate suffrage is still retained by the several States, provided only that they must not deny or abridge it on account of race, color, or previous condition of servitude and that the regulation applies equally and impartially.

United States v. Harris, 106 U.S. 636, 644, 27 L. Ed. 292, 295, 1 Sup. Ct. Rep. 601; *James v. Bowman*, 190 U.S. 127, 47 L. Ed. 979, 23 Sup. Ct. Rep. 678; *Minor v. Happersett*, 21 Wall. 178, 22 L. Ed. 631; *United States v. Reese*, 92 U.S. 214, 217, 218, 23 L. Ed. 563-565; *United States v. Cruikshank*, 92 U.S. 542, 555, 556, 23 L. Ed. 588, 592; *MacDougall v. Green*, 335 U.S. 1, 49 S. Ct. 1, 93 L. Ed. 3; *Pope v. Williams*, 193 U.S. 621, 48 L. Ed. 817.

States may prescribe for all popular elections any qualification of age, sex, residence, property, or education which they see fit to prescribe, subject only to the restriction that their constitution and laws regulating the subject apply uniformly and impartially to white and colored alike.

Williams v. Mississippi, 170 U.S. 213, 42 L. Ed. 1012, 18 Sup. Ct. Rept. 583; *Gibson v. Mississippi*, 162 U.S. 582, 40 L. Ed. 1079, 16 Sup. Ct. Rept. 904; *Giles v. Harris*, 189 U.S. 475, 47 L. Ed. 909, 23 Sup. Ct. Rept. 639; *James v. Bowman*, 190 U.S. 127, 47 L. Ed. 979, 23 Sup. Ct. Rept. 678; *Guinn v. United States*, 238 U.S. 347. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072; note to *State ex rel Allison v. Blake*, 12 L.R.A. 480; 47 American Bar Association Journal 251 (March 1961).

The regulation of the right to vote belongs exclusively to the State. It is not a civil right or privilege, but a political right, not necessarily resulting from citizenship, and over the acquisition and enjoyment of which the judicial power of the United States has no jurisdiction or control, except in cases falling within and governed by the 15th amendment.

Scott v. Sandford, 19 How. 393, 15 L. Ed. 691; *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Slaughter-House Cases*, 16 Wall. 79, 21 L. Ed. 409; *Neal v. Delaware*, 103 U.S. 370, 26 L. Ed. 567; *Ex parte Yarbrough*, 110 U.S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rept. 152; *Amy v. Smith*, 1 Litt (Ky.) 326; *Lanz v. Randall*, 4 Dill. 425, Fed. Case No. 8,080; *Short v. State*, 80 Md. 401, 29 L.R.A. 404, 31 Atl. 322; *Anderson v. Baker*, 23 Md. 531.

The 15th amendment does not confer the right of suffrage on anyone but operates to prevent discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563.

"While section 2 of the 14th amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed) speaks of 'the right to vote,' the right protected 'refers to the right to vote as established by the laws and constitution of the State.' *McPherson v. Blacker*, 146 U.S. 1, 39, 13 S. Ct. 3, 12, 38 L. Ed. 899." *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072.

The *Lassiter* case, *supra*, holds that a State statutory requirement, applicable to all races, that a prospective voter be able to read and write any section of the State constitution in the English language is a fair way of determining whether a person is literate and bears a relationship to the desire of a State to raise the standard for people of all races who cast the ballot. In its unanimous opinion, the court cited its ruling in *Guinn v. United States*, 238 U.S. 347, that the establishment of a literacy test "was but the exercise by the State of a lawful power vested in it not subject to our supervision." In the *Lassiter* case, *supra*, the court commented on State literacy requirements as follows:

"The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society, where newspapers, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise."

MEMORANDUM

The particular Senate bill in question, No. 2750, sets forth the declaration that the Congress of the United States finds that there are certain inadequacies, or arbitrary and unreasonable ways practiced by the local States and territories to deprive people of "the right to vote."

The bill further points out that it would be a violation of the law to: (1) apply any standards of procedure to persons more stringent than are applied to others similarly situated and (2) denial for any person "otherwise qualified by law" of the right to vote on account of his performance in any examination whether for literacy or otherwise. If such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia or the Commonwealth of Puerto Rico.

The very first thing that flashes here is a conflict in the constitutional provisions which have long been upheld by the U.S. Supreme Court which grants to the various States this particular right to set up qualifications insofar as the voters of that State are concerned.

In the most famous decision on this question, the U.S. Supreme Court stated what the law should be (*Guinn v. United States*, 238 U.S. 347.)

Therefore, the U.S. Supreme Court has time and time again held that as long as the individual States did not discriminate or be in violation of the 14th or 15th amendment, that various standards set up which did not discriminate and which are reasonable, could be used by the various States in its application of its State's power to determine who should or should not become a registered voter.

This "right to vote"—which we rightly call the "privilege to vote"—has been an issue in the United States since its inception. In 1760, the franchise were limited by property qualifications. (See the "Growth of American Republic," by Samuel Elliot Morrison and Henry Steel Commager, professor of history, Columbia University, Oxford Press 1942.)

At page 163, the authors indicate that there were really "two American Revolutions at the same time, the sectional revolt of 13 counties against imperial centralization and a class upheaval against vested interests and local governing classes. There could be no doubt that the importance of the voting privilege dominated a lot of the thinking of the men of our country at the time of the formation of the Government."

As so much a document as the Declaration of Independence of 1776, in its concluding paragraph, after making its strong petition for freedom and independence, the writers of that document concluded it by saying:

"We, therefore, the representatives of the United States of America, in general Congress, assemble, appealing to the Supreme Judge of the world for the rectitude of our intentions, due, in the name, and by authority, of the good

people of these countries, solemnly publish and declare, that these united countries are and of right are to be *free and independent states*; that they are absolved from all allegiance to the British Crown, that all political connection between them and the state of Great Britain, is and are to be totally dissolved; and that as *free and independent states*, they have full power to levy war, conclude peace, contact alliances, establish commerce and to do all other acts and things which independent states may of right do. In further support of this declaration, with a firm reliance on the protection of divine providence, we mutually pledge to each other our lives, our fortunes and our sacred honor."

The forefathers of our country in attempting to adopt a new Constitution following the experience under the Articles of Confederation, paid tremendous attention to the position of the States as they would be under the new republican form of government.

In the Federalists, No. 17, by Hamilton, he points out what advantages the new form of government would be to each individual State. It is interesting to note what Hamilton states in a portion of the Federalists, No. 17. Some of the quotations are as follows:

"It may be said that it would tend to render the Government of the Union too powerful, and to enable it to absolve those rules * * *, which it might be judged proper to leave with the States for local purposes; allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptations the persons entrusted with the administration of the General Government could ever feel to divest the States of the authorities of that description."

In the same light he makes this comparison in the same paper—

"It will always be far more easy for the State governments to encroach upon the national authorities, and for the National Government to encroach upon the State authorities. The proof of this composition turns upon the greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty."

Hamilton, continuing his discourse on the Articles of Confederation and the new Constitution in Federalist, No. 59, speaking of that provision which states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law, make or alter such Regulations, except as to the Places of choosing Senators."

And then Hamilton continues by saying: "It will not be alleged, that an election law could have been framed and inserted into a constitution which would have been always applicable to every vulnerable change in the situation of the country * * *".

The Southern States, after the Civil War, were forced into a position of amending the Constitution, and laws to make sure that the people who attempted to exercise the privilege of voting were basically qualified to understand the issues upon which they voted.

MAY THE FEDERAL GOVERNMENT ENCROACH UPON THE REALM OF STATE ACTIVITY AND INTERFERE IN A SPHERE RESERVED TO THE STATES?

Heretofore the States have had exclusive jurisdiction subject to the supervision of their action by courts of voter's qualification.

The U.S. Supreme Court has time and time again used the 14th and 15th amendments of the Constitution to overrun particular incidents either under civil rights or under voters' requirements, which, in their opinion, were of a discriminatory nature or which deprived people of equal protection of the law. It would seem therefore that insofar as voting is concerned, that specifically the 15th amendment of the Constitution is the protection needed by various individuals to protect the so-called privilege of voting.

Amendment 15 reads as follows:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."

It would seem, therefore, that what the Government is attempting to do by statute is place into the law an additional requirement that one need not have anything but a sixth grade education to be considered a person under the 15th amendment. Of course, as that is their intent, the procedure should be by the amending of the Constitution which would, in effect, declare that the "right of citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, previous condition of servitude, or the fact that they have not completed seven primary grades of education."

It would seem, therefore, as specifically indicated heretofore, that there are sufficient laws on the books and sufficient jurisprudence by the U.S. Supreme Court to protect anyone in connection with the so-called discrimination as to voting requirements, either in procedure of standards which might not be applied equally, or to the fact that a person would have been unjustly deprived of the privilege to vote because of an alleged literacy test which might be applied on an unequal basis between people of various races.

The problem then presents itself again, which has presented itself through the last couple of years, as to how far the Federal Government will go in an effort to control every operation in the individual States. It cannot be said that this problem as to voter requirement of a literacy test is essentially a problem dealing with any particular section of the country. This problem is one that is felt by practically every State in the Union as some requirements are made in an effort to determine whether or not the individual presenting himself for voting is an individual qualified to vote.

It would seem that every State in the Union has a requirement for a person either to be a U.S. citizen or a naturalized citizen thereof, a certain requirement as to age and for residency. Not all the States have the requirement insofar as illiteracy is concerned but have provisions within their State law which calls for, in essence, a notation as to intelligence because it is necessary that the individual fill out some particular form of application.

Therefore, the problem which presents itself here is one which affects every State in the Union and while it may not be said that there is any particular problem by determining that a sixth primary grade education is enough to determine literacy, it could be said that this is just another phase of the beginning of the end. Is this the last move by the Federal Government into the sphere of voter requirements by each individual State?

Would it not be said by the Federal Government in years to come that a person need not be but 5 years of age or 12 years of age in order to vote? Could it not be said that a person need not live in the jurisdiction of the State, but for 1 day or 2 days, or 2 months? Could it not be said that the only thing necessary to vote would be the approach to the registration office and the attempt to affix a signature or a mark?

If this country is to be run by intelligent people and have an intelligent electorate, it would seem that there would be necessarily applied to the privilege of vote, the right of the States to control the caliber and quality of the people who should cast that vote. If the Federal Government is allowed to determine at this time that a sixth primary grade education is enough to make a person intelligent enough to cast a vote, what will happen in the future?

Needless to say, the Federal Government has, through the medium of decisions of the U.S. Supreme Court, completely departed from the original concept of voting. However, the dangerous position here is not that voting requirement is either made more lenient or stringent, but is a fact that the U.S. Government, through the process, is attempting to take away the last vestige of statehood from each and every State in the Union. If the Federal Government be allowed to have the right to determine under this statute, what it attempts to do, it has in essence written off the 10th amendment of the Constitution. Therein whatever was reserved to the States, and I daresay that today a State has to look far and wide to determine what rights it still has, would have been definitely lost through the authority of the Federal Government.

In the interpretation of the various statutes passed by States, in not only civil rights but in voter registration, the Federal courts have taken it upon themselves to transfer from the sphere of State activity to the Federal Government the determination of what rights the States have or have not, to set such qualification.

The interpretation of the U.S. Supreme Court of the 14th, 15th, and 17th amendments under the *Civil Rights* cases have without any doubt, indicated a slowly pecking away at the rights of the States, those things which many of the

States, not particularly a section of the country, but all over the country, have slowly given forth to relinquishing their rights under the 10th amendment.

It would not take an individual State of the Union too much time in determining under the 10th amendment what rights are still reserved to the States. There is nothing in the Constitution of the United States, either by inference or otherwise, which will give to the Federal Government the right it now seeks to determine qualifications of voters as set up by the individual States.

To say that the Federal Government or the States possess against each other, the innate ability to determine that either a sixth grade or a high school graduate, or college graduate, have the basis for which to further determine what is necessary as requirements for being able to vote, would be to say that each one of them have this inherent knowledge.

But what is attempted to be said here is that the Federal Government should not be allowed to again usurp its influence and function into the State activity. This is perhaps a rather small way of the Federal Government attempting to evade the provisions of the Federal Constitution and attempting to write out of the Constitution amendment 10. If this is a sincere desire on the part of the Government, it would seem that amendment 15 of the Constitution clearly gives the right to the Federal Government to protect people for violation of the privilege to vote. They could in an effort to further protect, either amend or submit to the people, a new constitutional amendment which would say, in essence, "that the powers delegated to the United States by the Constitution nor prohibited to it by the States, are reserved to the States respectively or to the people except in the field of voting." Wherein a party should be eligible to vote if he has the following requirements and then in that article list the requirements.

In this way it would give each and every State a chance to determine whether or not this rule by the Federal Government gives them the right to move into the field which has been heretofore specifically reserved unto the States, with a check of the States by the Federal Government, through the 15th amendment of the Constitution.

There is no doubt that there is violent conflict herewith by this attempt by the Federal Government to pass legislation of this type in face of the holdings of the U.S. Supreme Court. In *Lassiter v. Northhampton Board of Election*, 360 U.S., page 45, the Supreme Court has again gone into the provisions of the literacy test after the test had been attacked as violating the 14th, 15th, and 17th amendments of the Federal Constitution.

The Court in holding literacy tests valid on page 50, Mr. Justice Douglas speaking for the Court had this to say: "We come back to the question whether a State may consistently with the 14th and 17th amendments, apply a literacy test to all voters irrespective of race or color."

The Court then went on to quote *Guinn v. United States*, page 306:

"No time need be spent on the question of the validity of the literacy test considered alone, since we have seen its establishment was but the exercise by the State of a lawful power invested in it not subject to our supervision, and indeed, its validity is admitted."

"The States have long been held to have broad power to determine the conditions under which the right of suffrage may be exercised." Proof of this is the *Williams* case (193 U.S. 621 at p. 633); *Madison v. Missouri* (179 U.S. 328, 335); absent, of course, is discrimination which the Constitution condemns.

"We do not suggest that any standards which the States desire to adopt may be required of voters. But there is wide scope of exercise of its jurisdiction. Resident requirements, age, previous criminal record, are obvious examples indicating factors which a State may take into consideration to determine the qualification of the voters. The ability to read or write likewise has some relation to standard desire to the use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as ports around the world will show. Literacy and intelligence are obviously facts anonymous. The illiterate people may be intelligent voters. Yet in our society, when newspapers, periodicals, books, and other printed matters canvass and debate campaign issues, a State might conclude that only those who are literate be franchised."

In essence, this case determined that a literacy test, as applied by States, as long as they were not violative of any provision of the Constitution, were under the direct control of the States. And it is interesting to note that in this case it is specifically pointed out that there are the constitutional amendments in the Constitution to protect people in connection with a literacy test because the Court said at page 53 in the same case: "Of course, a literacy test, fair on its face,

may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot."

In other words, in the *Northhampton-Lassiter* case, the Supreme Court was well aware of the fact that a literacy test could be used in an effort to deprive people of the privilege to vote, but that they believe that under the 15th amendment, these individuals will be protected and therefore, they must conclude that a statute such as the one to be recommended to the Congress of the United States would be in violation of the power granted heretofore by the States. Any citizen has the protection under the Federal Constitution, as it is now written, to go into court and protect his right if this particular test in any way discriminates against him.

If this particular piece of legislation is allowed to become law, the next step would be the reduction in the age requirement and resident requirement to suit the fancy of any particular political individual who suddenly determines that there are more voters in the 10-15 year-age bracket, than there are in the 21-65-age bracket.

Therefore, there seems to be no doubt that this is in direct conflict with the Constitution of the United States and the holdings as stated by the U.S. Supreme Court.

Another problem which of course presents itself as to who shall define and set out the standard as to literacy. There is nothing in the act which sets up a standard as to what literacy is and what illiteracy is. It would seem therefore that in the particular act it would be necessary to particularly herewith define what the Federal Government indicates is the definition of a literate person.

In Webster's new 20th Century Dictionary, the term "literate" is defined as: "Educated, especially able to read and write."

A Federal Government is interested in this man's ability or person's ability to read or write. Then it should be specifically stated that the Congress of the United States can now, by legislation, determine what is or is not literacy. If the only requirement they desire is the fact that somebody be able to read or write, then I think they could even reduce the requirements from the sixth primary grade to perhaps the fourth. It would seem logical to assume that by the time a person reaches the fourth or fifth grade, they would be in a position to read and to write. Then the question would be as to how much reading and writing would be necessary. Therefore, it would seem that a standard would have to be set up as to whether or not reading should only take into consideration the reading of the individual's name, or, insofar as writing is concerned, the writing of the individual's name.

These are fields in which the law has not particularly set out any special standards.

It would seem also that the various States, in an effort to determine proper voter qualifications, have taken into consideration something more than the ability to read or write. The individual is required to answer questions in connection with certain crimes he may or may not have committed the residency where he is now located. It could be said that an individual who has finished the sixth primary grade could possibly only know how to read the most elementary things and be able to write his signature in the most crude manner. However, it is the opinion that most States have not only literacy and illiteracy but some sort of standard as to the intelligence of the individual who is attempting to become a voter.

The Congress, under the provisions of this bill, are attempting to put a small segment of the population in a better position or discriminating against the balance of the population for a minority group, in an effort to get the minority group to become voters, whether the minority group intends to become voters or not.

In cases heretofore before the U.S. Supreme Court, notably cases in which this State has been involved, in reference to voter registration, there have always been cases involving whether or not the provisions of the 15th amendment have been violated. In a most recent case before the U.S. Supreme Court involving voter registration and discrimination, the U.S. Government coming in under special provisions of the law, alleged violation of the 15th amendment.

SUFFRAGE AND ELECTION IN LOUISIANA

In Louisiana, the requirements to become a voter are set out in article 8, section 1, of the Louisiana constitution of 1921, as amended. In the constitution, the requirements to become a registered voter are those on connection with citizenship and age.

1. You must be either a native or a naturalized citizen, not less than 21 years of age, and possess the following requirements: (a) A certain resident requirement in the State of 1 year, in the parish of 6 months, and then the municipality in municipal elections of 4 months. And there are provisions of removal from one precinct to the other.

2. The next qualification, in addition to citizenship, age, and residence is that of character and literacy. In the Louisiana constitution, article 8, section 1, paragraph C, good character is defined. That is, there is a standard set out insofar as determination of good character. These standards applied in an equal fashion for all persons, meet the requirements of the holdings of the U.S. Supreme Court. In addition to the standards of moral character there is listed the so-called literacy test. The literacy test in Louisiana consists of the completion of the registration blank which has pertinent information on it to endeavor positive identification and other information. Basically, however, the powers that determine whether or not a person is literate or illiterate are set out in the constitution and are as follows:

1. A person must be able to read and write the English language or his mother's tongue.

2. He must demonstrate his ability to read and write when applies for registration by the reading and the writing from dictation given by the registrar or an interpreter, any portion of the preamble to the Constitution of the United States, and by making under oath, administered by the registration officer, written application for registration in the English language or his mother's tongue.

3. This application shall contain certain essential facts to show that he is entitled to register and vote. The application should be entirely written, dated and signed by the applicant.

If the applicant is unable to write his application in the English language, he shall have the right to put it in his mother's tongue from dictation of an interpreter. And as an additional requirement that if he has a physical disability, he may write it by the means of dictating same to the Deputy.

The provisions in connection with registration is the completion by the applicant of the following blank card; or one similar to it:

I am a citizen of the State of Louisiana.

My name is

Mr.	}	
Mrs.		
Miss		

I was born in the county of _____, parish of _____ on the _____ day of _____ in the year _____.

I am now _____ years _____ months and _____ days of age.

I have resided in this State since _____, in this parish since _____, and in the precinct No. _____, in ward No. _____, of this parish, continuously since _____.

That I am not disenfranchised by any provisions of the constitution of the State.

This so-called test is part of the registration procedure in the State of Louisiana. The significance of the literacy test as previously indicated, is historical. The people of this country have had some qualifications or requirements attached to the process of voting for a long time. This requirement as to voting has been from time to time modified to some extent but there still remains, in nearly every State in the Union, the requirements as to age, residence and citizenship. In a good number of the States, and particularly Louisiana, the poll tax has been abolished. (See 5 New York Law Forum, 451, 1961).

However, in Louisiana, there are still many, many elections in which it is necessary for the voter to be a bona fide taxpayer because of the type of election involved. In elections on bond issues which require the approval of the property owners, of course, only those people who have property rights are allowed to cast their ballot.

As can be seen, therefore, many of the States, including Louisiana, take the position that any person desiring to become a registered voter must meet certain requirements as to demonstrate his ability to understand citizenship.

This is not to say that the Federal Government, or any State, should take lightly the position of requiring some sort of test to determine literacy or illiteracy of a voter. It must be assumed that since there are still requirements as to age, residence and citizenship, that no one is in favor at this time of removing all of these qualifications from the law and allowing indiscriminate voting by people of all ages and no matter where they reside. It must also be assumed that the various States in adopting the conditions to voting did so as a matter of protection against illegal or fraudulent voting. Unless there was some conditions attached to voting, it would be a fairly simple thing, for voting to be highly irregular, and there would never be a stable election held in the country or State.

There are many elections which require a tremendous amount of study by the individuals as to what the purposes of the election are and what the issues are. One of the best examples of such an election are those in which constitutional amendments, especially as to the State of Louisiana, are concerned. In the Federal Government, a constitutional amendment is adopted by the legislatures of the various States, but in Louisiana and a lot of other States, the electorate must understand what is transpiring and on the date of election, understand enough of the issues so that they may intelligently cast their vote. Whether or not the requirement of the Federal Government of a sixth primary grade education would be enough for the electorate then to intelligently determine what the issues are is problematic. There is no way to tell whether or not the present system of a 21-year-old individual who lacks formal education has enough ability to understand issues that they are voting upon. It is not difficult to assume that even people who are of high intelligence and with formal college training have difficulty understanding these issues in an election.

However, if the Federal Government is of the belief that elections for public office or for issues, such as bond issues and the like, are of such little importance that the age requirement of six primary grades would be enough, by that fact alone, to declare literacy, it would seem that they must be in a position to assume responsibility of what might transpire in the event that this bill is passed.

It would seem that it is very doubtful that a position of a sixth primary grader can by that fact alone be understood to have the necessary literacy and intelligence to cast a ballot in an important election.

The Federal Government here specifically indicates that the purpose of this bill is to assist a great "minority group" of the people whom they believe have difficulty becoming registered voters because of the so-called literacy test. This of course is along the same theme and theory of the Federal bureaucracy and centralization of government which is attempting to take away from the individual States one of the last vestiges of State's power. If the Federal Government be allowed to set the requirements and conditions of voting, a sphere heretofore allowed only to the States, it will be merely a matter of months or years before the Federal Government will, in essence, be calling the date of State elections, municipal elections, and town elections, in an effort to get their particular program pushed across.

In the State of Louisiana, there have been many advancements made toward the liberalizing of election laws, with the view in mind however, of not allowing them to become so liberal that they would actually not exist on the books. It is the contention of most lawmakers that the procedure for voting on various issues is important enough that certain restrictions be attached to it. Louisiana, in addition to that of making the law as liberal as possible, has still maintained certain provisions which are necessary in order to administratively take care of the functions of the registration offices throughout the State.

There are Louisiana laws which protect any individual who attempts to come into an office and register and is denied registration. The constitution of the State, article 8, section 5, and Louisiana Revised Statutes, title 18, section 138, provide for methods wherewith the voter can take his case to court. Therefore, it would seem in Louisiana that there are sufficient means under local law to allow individuals who feel that they have the qualifications to vote, from being denied those qualifications because of their particular incident of discrimination.

There seems to be no doubt that the election law offered by the group which calls for control of all elections is unconstitutional (Senate bill 480). There is nothing in the Constitution which allows the Federal Government to initiate any particular action at all in connection with local elections. While the Supreme Court has gone so far as to hold that in primaries where one political

party dominates this amounts to a Federal election if a Federal post is involved, they have not as yet and heretofore not said anything particular about how a State should conduct its local and municipal elections. Therefore, it must be concluded that the intent of the bill which calls for control over all the elections is one which is directly in conflict with the Constitution and the jurisprudence of the U.S. Supreme Court. (*See Guinn v. United States.*)

In connection with Senate bill No. 2750, however, there appears to be some questions involved as to definitions and qualification of terms. For instance the term "otherwise qualified by law" and the term when making reference to rejection and refusal to vote in connection with "performance in any examination whether for literacy or otherwise."

The problem is the determination of what "otherwise qualified by law" would mean. Does the Federal Government mean as otherwise qualified by State law or by a new Federal law which will be enacted. Does it mean that there are certain other requirements which must be first fulfilled before the presentation of the evidence of a sixth grade education in an effort to do away with the literacy test?

The next term when speaking of an examination in connection with "literacy or otherwise" it would seem wise at this time to have the Federal Government specifically spell out their definition of "literacy." They must set up a standard in the act as to what "literacy" is going to be and who is going to determine what "literacy" is at the time the applicant either applies for registration or applies for a certificate from an accredited school. Senate bill 2750 indicates that they would consider anybody who completes a sixth grade education as being literate. However, this does not per se indicate that the person would be able to read or write. The common definition of a literate person is someone who is able to read or write. How much reading and writing is necessary to be literate as opposed to illiteracy is very difficult and it is up to the Congress as to what constitutional procedure is set out to determine the standards necessary to become a literate voter.

It is not inconceivable that it is possible for someone to have completed the sixth grade and not be able to read or write according to some standards set by some individuals. It is easy to assume that an individual who is in the first grade begins the process of reading and may begin the process of writing. Should the reading and writing be limited only to the ability to read certain words in the English language or should the writing be limited mainly to the indication of a person's name. These are problems which will necessarily arise and unless the bill is modified to that extent anyway it seems that this will lead to nothing but confusion and lawsuits.

The most important word which is in the Senate bill 2750 appears to be in connection with the statement "literacy or otherwise." It is not at all clear as to what they mean by "otherwise."

There are two different phases becoming a voter in most of the States. First, there is the process of becoming registered which allows a person the right then to cast a ballot assuming that it is the type of election in which he is eligible. But does it mean that merely because your name is on the registration role that you will be able to cast a ballot?

In the State of Louisiana the process of registration requires that the individual meet certain requirements which are included in a literacy test which call for the applicant to eventually sign his name. Supposing an applicant, for the sake of argument, appears in the registration office, offers himself for registration, states that he is over the age of 21, gives the proper age, and indicates that he resides in the State of Louisiana, in a proper parish, and then he is requested to sign the registration card. Suppose he contends that the signature on the registration card would then be part of the literacy test, therefore, he is not required under the law to sign the application if he can prove that he is graduated or finished an elementary sixth grade education. It must be remembered that the signature is the vital and important fact in the casting of the casting of the ballot in Louisiana on election day. (*See L.R.S. A-1811-1198.*) In order to cast a ballot on election day, the applicant must in some kind of way be identified. One of the best known ways to be identified and to assure someone that a vote has been cast in connection with that particular person, would be to have that person's signature appear on the registration rolls. If it is not possible at all for the signature to be part of the registration card then there will have to be special legislation by the State of Louisiana, aside from the registration card, some sort of special affidavit at the time of registration which would require the applicant to sign his name.

However, assuming even that an applicant was to do that, what if the application is given to the man which indicates only as to his date of birth, and how long he has lived in the parish or the State, and down at the bottom of the application, a word to the effect that one does "affix his signature to this card." What, if the applicant cannot read the words "affix his signature to the card"? Would it then be necessary for him to take a test of literacy or would the production of a certificate indicating that he had completed six elementary grades of education be enough? Does he have to read specific words, or have only a general knowledge of reading?

It would cause confusion within the State and also be necessary to enact additional legislation to take care of the process of voting. There is an altogether different standard and requirement set up for the actual casting of a ballot in an election, than there is for becoming a registered voter.

There are many people who become registered voters and who never cast a ballot. The only way a ballot can be counted at the polls is to have some sort of mark of identification. If an applicant was to come into the registration office and refuse to sign his name on the registration card (which is the only means today of determining exactly when he cast his ballot) what would be the results on election day? How would the individual be identified? If he is allowed to say I have completed the sixth grade and my name is "Joe Blow" and "you put it down on my application as Joe Blow on the typewriter." How will the man be able to cast a vote on election day? Would that be all he has to do in an effort to have his ballot counted on election day, would be to walk in the polls and say, "I am Joe Blow, that's my name typed there, please vote me." Needless to say, any tampering, by any kind of government, whether Federal or State, with the requirements of registration at this time or at any other time would be very dangerous in connection with the election process. The only problem here is with the so-called privilege to vote and the fact that everybody be given equal opportunity and treatment. Under the 15th amendment, which governs just about every particular election procedure that could come up, the right of a voter is protected. There appears to be every conceivable means of assisting a particular party as long as the party is not discriminated against. Also the analytical argument can be made that why require a sixth grade education? Why not state that anybody who can read or write, is literate under a broad definition of "literate" and if they can read or write even if in the first grade, that they be allowed to cast their ballot. It seems that literacy is not the correct term to use in connection with registration, but should be literacy and intelligence. There is no doubt that there is a certain amount of intelligence that must go through the procedure of casting a ballot and becoming a registered voter.

There is no need to concentrate on the law involved in this matter. The Constitution of the United States is particularly clear in that the Federal Government has a right to name the proper time, manner and place of election of Federal officers, but is absolutely silent for the position of requiring voters in various States to meet certain requirements that the States themselves have not set up. And, if that would not be enough, the U.S. Supreme Court has ruled in *Guinn v. United States*, *supra*, that the right to set up the qualifications remains with the States.

The conclusion must be reached that Senate bill No. 480, the one which requires the Federal Government to pass the law which would abolish literacy tests in *all* elections is unequivocally unconstitutional. As far as Senate bill No. 2750 is concerned, again there is no doubt that it is unconstitutional. If it is possible to make it constitutional, it would be necessary to define what "otherwise qualified by law" is, and also determine what literacy or the broad phrase "otherwise" would mean in connection with an applicant coming for registration. It should also be clearly pointed out the bill should be written to indicate that this does not in any way have anything to do with the law of casting the ballot. The mere fact that a registrant becomes a member of the voting society does not in itself mean that that registrant can cast his ballot on election day. Many things may have intervened which would make the person ineligible to cast a vote. Therefore, it must be assumed that the phrase "otherwise" must be limited to the extent that it must indicate that this applies only to the time that an applicant appears for registration.

Even if those things have been complied with, it seems to be very difficult to find any constitutional basis for the Federal Government to extend its long arm at this time into the local field dealing with registration of voters. There have

been civil rights suits in voter registration matters. These suits have been brought under the 14th, 15th, and 17th amendment and where relief was necessary, it was granted. Therefore, it can be stated that the minority group no matter how large it is will be protected as long as these amendments are interpreted by the U.S. Supreme Court. We have no reason at the present time to believe that the Court will change its mind in connection with its various rulings in voting cases. The committee who is hearing this bill understands precisely what the constitutional questions are as they have indicated in their letter and the answer that they would like to have that in view of, and in spite of *Guinn v. United States*. The Federal Government at this time is attempting to do away with the literacy test which in effect will mean that the Federal Government will set up the standard in connection with voting registration in the various States. It is a very dangerous thing when the Federal Government is determining the requirements necessary in local elections.

This country has been existing for some great length of time without the necessity of doing away with literacy tests or other requirements as set up by various States. At the present time, there seems to be no particular advantage to anyone but the Federal Government to determine that literacy now should be judicially declared by the Government of the United States.

Of course, who knows whether or not this is the last point that the Federal Government will seek in connection with voter registration. Why not have the next particular statute deal with age requirement, residency requirement and citizenship requirement. Wouldn't it be just as easy for the Federal Government if they could eliminate the so-called literacy test, to also eliminate the requirement of age. It is of no moment to say that the Federal Government would not do this, because a mere reading of the "Federalist" shows the early mistake of believing that the Federal Government would never attempt to seize power from the States. The fact remains that the Federal Government has grown stronger and stronger, while the States in whatever rights that they might still have, have grown weaker and weaker. This has been possible because the U.S. Supreme Court has pecked away at the various rights of the States and have left only a shell to the 10th amendment.

It would seem awfully strange to the politicians who are elected to represent the people, to merely stand by and allow the power of the States in setting up voter registration, to be taken away from the people and given to a Federal Government.

If this committee is sincere, and believes that the Federal Government should have this right, then this committee in all fairness, should formulate the necessary legislature to expunge from the Constitution of the United States, Amendment No. 10, so that each and every State in the Union can now fully realize that they cease to exist as a unity and have become mere territories attached to a Federal Government; and can only exist by the whims and desires of this Federal power.

MEMORANDUM ON S. 2979

The same objections in the previous memoranda on S. 2750 and S. 480 are applicable to S. 2979.

The effect of S. 2979 is to make Congress the judge of the validity of all voter qualifications. The proposed act preempts for the Federal Government the entire field of voter qualifications and is obnoxious to the Federal Constitution.

The Federal Government must find authority to prescribe voter qualifications in the Federal Constitution, in order for S. 2979 to be constitutional. No such authority for the Federal Government exists anywhere in the Federal Constitution. In fact, it is the other way around. Such authority is given to the States.

Article 1, section 2, clause 1, and amendment 17 of the Constitution specifically authorize each State to prescribe the qualifications of voters in congressional elections; and article 2, section 1, and amendment 12 provide for the determination by each State of voter qualifications in the election of presidential electors.

In *Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654, 96 L. Ed. 804, the Court said: "The presidential electors exercise a Federal function in balloting for President and Vice President but they are not Federal officers or agents any more than the State elector who votes for Congressmen. They act by authority of the State that in turn receives its authority from the Federal Constitution."

In *Breedlove v. Suttles* (302 U.S. 277; 58 S. Ct. 205; 82 L. Ed. 252), the Court said: "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the 15th and 19th amendments and other

provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."

In *Snowden v. Hughes* (321 U.S. 1; 64 S. Ct. 317; 88 L. Ed. 497), the Court said: "The right to become a candidate for State office, like the right to vote for the election of State officers, is a right or privilege of State citizenship not of national citizenship."

Proposed S. 2079 attempts to find its authority in the 14th and 15th amendments.

There is nothing in the 14th or 15th amendments which takes away the authority of a State to prescribe voter qualifications and gives it to the Federal Government. The 14th amendment itself, in section 2, recognizes the prerogative of each State to prescribe voter qualifications in addition to age, residence, and crime (*Saunders v. Wilkins* (152 F. 2d 235; cert. den. 328 U.S. 870; 66 S. Ct. 1362; 90 L. Ed. 1640); "Willoughby on the Constitution of the United States" (2d ed., vol. 2, sec. 347, pp. 625-626)).

In *McPherson v. Blacker* (146 U.S. 1; 13 S. Ct. 3; 36 L. Ed. 869), the Court said:

"* * * In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *Re Green* (134 U.S. 377, 379 (33:951, 962)), 'no more officers or agent of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people of the States when acting as the electors of Representatives in Congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive * * *."

"* * * The 15th amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been (*United States v. Cruikshank* (92 U.S. 542 (23:588))); (*United States v. Reese* (92 U.S. 214 (23:563))) * * *."

"* * * The first section of the 14th amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the State, having attained majority and being a citizen of the United States, then the basis of representation to which each State is entitled in the Congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors.

"The object of the 14th amendment in respect to citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the State and Federal Governments to each other, and of both Governments to the people (*Re Kemmler* (136 U.S. 436 (34:519))) * * *."

While the 14th and 15th amendments prohibit the State from prescribing voter qualifications which are discriminatory, these amendments do not give Congress authority to determine that only certain voter qualifications are non-discriminatory and to restrict the States to the use of such Congress-approved voter qualifications. Such an extension of the 14th and 15th amendments would obliterate the provisions of article I, section 2, clause 1, article II, section 1, and the 17th amendment of the Constitution referred to above. Such a distortion of the 14th and 15th amendments would have Congress usurping the function of the judiciary.

The U.S. Supreme Court has already recognized as valid and nondiscriminatory and not in violation of the 14th or 15th amendments voter qualifications of age, residence, property, and education required by the States. *Breedlove v. Suttles*, supra; *Pope v. Williams* (193 U.S. 621, 48 L. Ed. 817); *Williams v. Mississippi* (170 U.S. 218, 42 L. Ed. 1012, 18 Sup. Ct. Rep. 564); *Hobson v. Mississippi* (162 U.S. 582, 40 L. Ed. 1079, 16 Sup. Ct. Rep. 904); *Giles v. Harris* (189 U.S. 475, 47 L. Ed. 909, 23 Sup. Ct. Rep. 639); *James v. Bowman* (190 U.S.

127, 47 L. Ed. 979, 23 Sup. Ct. Rep. 678) ; *Guinn v. United States* (238 U.S. 347). *Lassiter v. Northampton County Board of Elections* (36 U.S. 45, 70 S. Ct. 985, 3 L. Ed. 1072) ; note to *State ex rel Allison v. Blake* (25 L.R.A. 480; 47 American Bar Assn. Journal 251 (March 1901)).

An interesting provision in S. 2970 is section 5 thereof which provides for the census to include a compilation of voting and registration statistics of persons of voting age. The purpose of this provision should be explored, particularly with reference to the penalty provided in section 2 of the 14th amendment.

MAINE

AUGUSTA, March 21, 1962.

HON. SAM J. ERVIN, JR.,
Committee on the Judiciary, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I'm sorry to be so late in answering your questions concerning S. 2750 and S.840 relating to literacy requirements with respect to the right to vote. I realize that your hearings are in progress. However, you may put these comments to whatever use you desire.

In my opinion, the wording of the two bills overlooks completely article I and the 17th amendment of the U.S. Constitution; the key phrases being, "The electors in each State shall have the *qualifications* requisite for electors of the most numerous branch of the State legislatures." (Emphasis added.)

The appropriate constitutional and statutory provisions in this State are as follows:

CONSTITUTION OF MAINE, ARTICLE II, SECTION 1

"Every citizen of the United States of the age of twenty-one years and upwards, excepting paupers and persons under guardianship, having his or her residence established in this state for the term of six months next preceding any election, shall be an elector for governor, senators and representatives in the city, town or plantation where his or her residence has been established for the term of three months next preceding such election, and he or she shall continue to be an elector in such city, town or plantation for the period of three months after his or her removal therefrom, if he or she continues to reside in this state during such period, unless barred by the provisions of the second paragraph of this section; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this state, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place, in any city, town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the city, town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the state in the military service of the United States, or of this state.

"No person shall have the right to vote or be eligible to office under the constitution of this state, who shall not be able to read the constitution in the English language, and write his name; *provided, however*, that this shall not apply to any person prevented by a physical disability from complying with its requisition, nor to any person who had the right to vote on the fourth day of January in the year one thousand eight hundred and ninety-three.

"Every Indian, residing on tribal reservations and otherwise qualified, shall be an elector in all county, state and national elections."

REVISED STATUTES OF MAINE, CHAPTER 3-A, SECTION 24

"Voting qualifications: A person who meets the following requirements may vote in any election in the municipality in which his residence is established.

I. Citizenship: He must be a citizen of the United States.

II. Ability to read: He must read from the constitution of the State of Maine in a manner which shows he is neither being prompted nor reciting from memory. He must write his name in English.

(a) *Exception.*—This subsection does not apply to a person who is prevented by physical disability from performing its requirements, but he may be required to supply reasonable proof of his knowledge.

III. Age: He must be at least 21 years of age.

IV. Residence: He must have established a residence in this State for at least 6 months, and in the municipality in which he resides for 3 months next prior to Election Day.

V. Registration: He must be registered to vote in the municipality.

VI. Enrollment: He must be enrolled in a party in the municipality in order to vote at a caucus, convention, or primary election."

As the U.S. Supreme Court so aptly stated in *Guinn v. United States*, 238 U.S. 347. "No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision. * * *"

There might be added to this, "nor subject to change by Federal legislation."

The language of both bills is an obvious attempt to set voter qualifications contrary to article I and the 17th amendment to the Constitution. The implication is that there is a conflict between these two sections of the Constitution and the 14th and 15th amendments. This is not so.

My only comment on the prima facie presumption is that the fact of completion of a sixth-grade education must have a rational connection with the fact presumed, that it constitutes literacy. There certainly is a connection here, but whether more rational than arbitrary, I cannot say.

Sincerely yours,

FRANK E. HANCOCK, *Attorney General*.

AUGUSTA, April 11, 1962.

Hon. SAM J. ERVIN, Jr.,
Committee on the Judiciary,
Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: In my opinion S. 2979 is no different than S. 2750 or S. 480 with respect to its constitutionality. Different words don't change the meaning. My position is the same with respect to all the bills. I believe them to be unconstitutional.

Sincerely yours,

FRANK E. HANCOCK, *Attorney General*.

MASSACHUSETTS

BOSTON, March 20, 1962.

Hon. SAM ERVIN, Jr.,
Member of the U.S. Senate,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: This letter is written in reply to your letter of recent date enclosing two proposed Senate bills which are in hearing this week.

In your letter you ask my opinion concerning the constitutionality and desirability of these two bills and enclosed you will find a memorandum indicating our opinion on this subject.

In brief, it is our feeling that both proposed bills are constitutional and furthermore, desirable, to meet a national problem existing in the area of suffrage. Accordingly, we support the legislation and I would appreciate it if you would indicate our support during the committee hearings and submit this memorandum to the subcommittee.

As indicated in the opinion, we note that this legislation will affect Massachusetts' law which presently contains a requirement in connection with ability to read English but we feel that in this respect our State law is not abreast with the requirements of the times.

You also asked specifically about our opinion as to the constitutionality of an enactment which bars literacy tests in connection with persons having at least a sixth grade education. Our feeling is that the constitutional power which exists can, without question, be used to this reasonable extent.

If you have any further questions, please do not hesitate to write.

Best regards.

Very truly yours,

EDWARD J. MCCORMACK, Jr.,
Attorney General.

MEMORANDUM OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS WITH RESPECT TO PROPOSED CONGRESSIONAL LEGISLATION ELIMINATING LITERACY TESTS

A. SUMMARY OF PROPOSED LEGISLATION

Two bills are proposed which are similar in nature. The thrust of both is toward prevention of denial of the franchise to citizens on account of race or color by use of literacy tests and other devices.

S. 2750, the administration bill, covers only Federal elections, whereas S. 480, proposed by Senator Javits and others, would extend to all elections, Federal, State, and local. This is the main distinction between the two bills. S. 2750 would legislatively find that "many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote; and that existing statutes are inadequate to assure that all qualified persons shall enjoy the right to vote." (Clause c.) In addition, it would also find that the franchise (1) is essential to a democracy (clause a); (2) "should be maintained free from discrimination and other corrupt influence" (clause b); (3) cannot reasonably be denied to persons with a sixth grade education on grounds of illiteracy or lack of education or intelligence (clause d); and (4) is denied to many Spanish-speaking Americans who are qualified to vote, a denial which is unreasonable on the basis of lack of proficiency in English (clause e).

Existing law would be amended by S. 2750 in accordance with these findings by making it an offense whether acting under color of law or not to "subject or attempt to subject any * * * person to the deprivation of the right to vote in any Federal election" which "deprivation" is defined in part as "(1) the application to any person of standards or procedures more stringent than are applied to others similarly situated; and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico."

S. 480 would make substantially the same legislative findings except that no direct finding would be made as to lack of proficiency in English affording no reasonable basis for denial of the vote. However, since no qualification is placed on education under the bill in connection with language, presumably a sixth grade education in any language would preclude a test being given to the citizen to determine his right to vote.

Existing law would be amended by S. 480 by providing that "All citizens of the United States who are otherwise qualified by law to vote * * * shall be * * * allowed to vote * * * without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy; any constitution, law, custom, usage, or regulation of any State or territory, or by or under its authority, to the contrary notwithstanding * * *." Such a test, standard, or practice is defined as "any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia."

B. CONSTITUTIONALITY OF THE PROPOSED LEGISLATION—BASIC LAW WITH RESPECT TO THE FRANCHISE

It would seem that both bills are constitutional as an exercise of the Federal power over the elective process, U.S. Constitution, article I, section 4, and amendments 14, 15, and 17.

The Constitution, as originally enacted, provided in article I, section 2, that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." It further provided in article II, section 1, the article which provides for the electoral college, that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress * * *."

These provisions, and other similar ones appearing in the 12th and 17th amendments to the Constitution, have always been cited by those who would restrict and even deny the power of the Federal Government to legislate with respect to the franchise and qualifications necessary to exercise it.

But Federal power in this domain can hardly be denied. Obviously the vote is a most basic right to the American democratic system. It is a fact that the American Revolution sprang from the opposition of the American citizens to government administered by those whom they did not choose. Accordingly, Federal power was provided at the outset by the drafters of the Constitution. In article I, section 4, it is provided that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Plainly then, at least with respect to Federal elections, Federal power has existed from the dawn of our history. The fact that power over the vote was not used until 1842 with respect to the requirement that Representatives in Congress be chosen in districts composed of contiguous areas rather than by general, open, statewide election, *Ex parte Yarbrough*, 100 U.S. 651, did not make it any the less the basic law of the land. Constitutional power cannot be waived by inaction for however long.

Since the original enactment of the Constitution, moreover, several amendments to it have dealt with the Federal power over the right to vote. The 15th and 19th amendments specifically directed the United States and the several States not to deny the vote on the basis of race, color, previous condition of servitude (15th amendment) or sex (19th amendment) and specifically gave Congress power to enforce these inhibitions by appropriate legislation.

ARTICLE XV

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XIX

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation."

Although not recognized at the time of its enactment as being directed to suffrage and qualifications for voters, it is plain that by virtue of the cases decided since then that the 14th amendment has and will have the greatest effect of any constitutional provision in the area. Appropriate parts are set out.

ARTICLE XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In setting out authority for the legislation, S. 2750 specifically cites article I, sections 4 and 5 of the 14th amendment, and section 2 of the 15th amendment.

S. 480, in the same connection, speaks of the Constitution generally and the 14th and 15th amendments specifically.

The basic case setting out the Federal power with respect to the franchise is *Ex parte Yarbrough*, cited above, at page 4, which was a habeas corpus petition by certain individuals convicted under a Federal law of conspiring to prevent by force a citizen entitled to vote from advocating another's election. In affirming the decision to deny the petition and holding the statute constitutional, the Court stated that:

"If this Government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general

government, it must have the power to protect the elections on which its existence depends from violence and corruption.

"If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."

It also asserted that it is not necessary to be able to point to specific constitutional words in every case involving a question of Federal congressional power. In this connection the Court says that:

"This principle (that what is implied is as much a part of an instrument as what is expressed) in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the Government or any branch of it by the Constitution. Article I, section 8, clause 18."

Now, as in 1884, the Federal Government has power to act to settle a national problem threatening the orderly process of our national life.

The Court further indicated that the 15th amendment, by limiting the power of the States to set voter qualifications, clearly shows that the right to vote is considered to be of supreme significance to the National Government and not intended to be left exclusively in the control of the States. It also asserts, moreover, that the right to vote in general is within the scope of congressional power and the 15th amendment, mainly designed for citizens of African descent, in no way limited that power to the discriminatory grounds set out in that amendment.

The opinion states that under article I, section 4, State election procedure is subject to Federal alteration and cites several examples of alteration. Furthermore, this power to change is not waived by the adoption of any length of time of the State qualifications as the Federal ones because the franchise is grounded on the Constitution and not on State law. The Court indicates that Congress may at any time pass laws in pursuance of the Constitution to insure the free and unfettered use of this most basic American right. That is the target of this proposed legislation.

What was said in the last paragraph of the *Yarbrough* decision might well apply today in the struggle of the Negro and other minority group voters to make themselves heard in the choice of those who govern them.

"If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

C. CONSTITUTIONALITY OF PROPOSED LEGISLATION—EXTENSION OF FEDERAL POWER

It remained for later cases to give the 14th amendment impact in the field both with respect to Federal and State elections. Two famous cases from Texas decided by two renowned judges set the pattern, *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73.

The former involved a State statute barring Negroes from participation in Democratic Party primary elections for candidates for National and State offices. It must be recognized that this effectively barred Negroes from any control over determination of elected officials since at that time nomination in Texas in Democratic primaries was tantamount to election and the general election was merely a form.

The Court struck the statute down as being repugnant to the equal protection clause of the 14th amendment. Justice Holmes stated the Court's opinion and at page 540 said: "We find it unnecessary to consider the 15th amendment, because it seems to us hard to imagine a more direct and obvious infringement of the 14th."

Later Mr. Nixon was forced to return again when Texas met the *Herndon* decision with a statute giving every political party, through its State executive committee, the "power to determine the qualifications of its own members." Predictably, the committee decided that one had to be white to be a Democrat, thereby again precluding Negroes from voting in the primary.

Speaking through Judge Cardozo, the Court deemed the action to be State action in violation of the equal protection clause of the 14th amendment and following the precedent of the *Herndon* decision struck down the Texas statute in violation of the 14th amendment.

More recent cases in the field of primary elections are *United States v. Classic*, 313 U.S. 299, which dealt with the Louisiana primary machinery, and *Smith v. Allwright*, 321 U.S. 649, which dealt with still another attempt by Texas to bar certain persons from primary elections.

The former case held that Congress had the power to regulate primary as well as general elections under article I, section 4, where the primary machinery, although in the hands of the party organization, actually provided for State action. The latter case was an action for damages claiming denial of the ballot in a primary election involving nomination of Federal and State officials on the basis of color. The Court reached the same determination as it had in the *Classic* case on the basis that the primary machinery in Texas was similar to that in Louisiana and the action was State action, unconstitutional in violation of the 15th amendment.

Davis v. Schnell, 81 F. Supp. 872, affirmed, 336 U.S. 933, involved a State literacy test unfair on its face which was struck down by the Supreme Court on the basis of the 14th and 15th amendments. The statute in question provided for a test of the citizen's ability to "understand and explain" an article of the Federal Constitution which was considered to go beyond the bounds of legal discretion in violation of the equal protection guarantee of the 14th amendment. Several States enacted statutes which excluded certain white citizens from literacy and character requirements by means of the so-called grandfather clause which usually provided that all persons who were entitled to vote in this or any foreign country, or lived in a foreign country prior to a certain date, usually around 1865, were not required to take such tests. Lineal descendants of such persons were included. Obviously this was directed against the Negro and with respect to several States this device was struck down as being repugnant. *Guinn v. U.S.*, 238 U.S. 347, 59 L. Ed. 1340, 35 S. Ct. 926 (1915). See also *Myers v. Anderson*, 238 U.S. 368, 59 L. Ed. 1349, 35 S. Ct. 932 (1915). *Lane v. Wilson*, 307 U.S. 268, 275, 83 L. Ed. 1281, 59 S. Ct. 872 (1939).

Even where the Court has not struck down literacy tests, it has recognized that worthy issues under the 14th and 15th amendments and the Constitution generally, exist. *Williams v. Mississippi*, 170 U.S. 113; *Trudeau v. Barnes*, 65 F. Supp. 563, cert. denied, 290 U.S. 659; *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45.

The *Lassiter* case, decided only a few years ago, held a literacy test constitutional which, on its face, applied to all voters regardless of race or color. The vital point in the case is that the statute drew no racial distinction on its face and no allegation of such distinction in the application of the State was sufficiently framed as an issue for the Court to make a determination. Had it been so framed, the Court could have decided with it in mind, *Yick Wo v. Hopkins*, 118 U.S. 356, and could have struck the statute down under the 14th and other amendments on the basis of its own prior decisions as indicated above.

The Court indicates that a line of cases has upheld the imposition of State standards "which are not discriminatory and which do not contravene any restriction * * * Congress * * * has imposed" (at page 51). Plainly, the language quoted impliedly recognizes the supremacy of the Federal Government in the suffrage area, allowing the States to act only as long as the Federal Government does not. In fact, the Court goes on to say at page 51 that "we do not suggest that any standards which a State desires to adopt may be required of voters."

D. CONCLUSIONS AS TO FEDERAL POWER OF SUFFRAGE

The cases and authorities clearly indicate that it is constitutional for the Federal judiciary and legislature to act in the area of suffrage either by striking State or Federal legislation coming before the courts or by Congress passing legislation. The authority for both can be found in article I, section 2, and the famous clauses of the first section of the 14th amendment of the U.S. Constitution, and applies to State as well as Federal elective processes. They further indicate that it had become customary for the States to a great extent to be allowed to set the qualifications of voters therein and that the Federal Government has in many instances accepted these qualifications as its own. After all, it must be recognized as a practical matter that it would be difficult to administer a system in which the qualifications of voters for Federal and State office were

different since many elections take place in which voters elect officials to both governments in the same election.

The proposed legislation is concerned with the extension of Federal power further than it has ever gone before in connection with the qualifications of voters in order to meet a national problem involving the denial to Negroes and other minority groups of their right to choose those who govern them by means of literacy tests and other devices employed unequally and unfairly.

The prior restraint of Congress in no way bars it from acting now, especially in light of the generally expanding power of the Federal Government in relation to the States through the 14th amendment in order to effectively settle national problems which cross State boundaries and affect basic American rights.

Although some of the qualifications which the States have set for voters in the past have been accepted as not being repugnant to the Constitution, there is no inconsistency in Congress now proposing to enact legislation with respect to these. In other words, it does not follow that because literacy requirements fair on their face have been declared constitutional, the Congress does not have power to later enact legislation doing away with such tests. We are concerned here with two areas: (1) the constitutional control over the elective process which allows the Supreme Court to act with respect to State and Federal action on the vote and (2) the constitutional power of the Congress to legislate with respect to it. There is no lack of consistency or logic in the overlapping of the two.

E. DESIRABILITY OF PROPOSED LEGISLATION

Apart from the constitutional issue, there is the question of the desirability of this legislation. It is herein submitted that such legislation is indeed desirable in connection with the preservation of basic American principles against encroachment of backward-looking action by officials of various States. Certainly, it is incumbent upon the Federal Government to use its power to effect a cure to a national problem involving basic rights, especially in a world where our political actions may determine our national survival.

It would seem fundamental (1) that no adult citizen of the United States who can understand the political issues of the day intelligently should be denied the right and duty to choose National, State, and local officials by means of the ballot, and (2) that it is contrary to the concept of cultural pluralism which has run throughout our history to raise one language to such a position of supremacy that those who "cannot speak it are denied the right to cast a ballot".

With respect to the latter, consider that the recent admission of Alaska and Hawaii to the Union has created many citizens who have little or no acquaintance with the English language. Certainly, in neither one of those States, is the Anglo-American tradition the major cultural tradition present, as is the case now in most of the other 48 States. But throughout our history, as new cultures have been brought to our shores, groups of citizens have lived here which contributed mightily to our growth, with little or no fluency in English.

As to intelligent use of the franchise, it seems eminently reasonable for Congress to state as a blanket rule that persons with a sixth grade education in public or private school in any language are equipped to cast a ballot. If a line is to be drawn at some point, it would seem that completion of six grades is a point at which a citizen would have learned the essentials of reading and writing, thereby rendering him capable to follow the political developments of the day sufficiently to render an intelligent decision.

Of course, it could be argued that literacy and language barriers in connection with voter qualifications could be done away with by action of State legislatures. But it profits little to a person denied use of the ballot to hear this argument for he is effectively barred from choosing legislators who might bring about such action.

It makes great sense that the Congress should recognize the extent of the problem and seek to cure it by action extending to all of the States. Much time has elapsed since a war was fought and amendments passed to make it possible for all qualified members of our society to take part in it. Over and over again various States have attempted, through literacy qualifications and other methods, to bar these citizens and repeatedly cases have come to the Federal courts for decision on the basis of the Constitution.

Rather than allow this piecemeal submission of cases to go on indefinitely, Congress now proposes to once and for all settle the matter which has been left in State hands for many years and has not been effectively dealt with by them.

It is a fact that no literacy qualification for voting exists in more than three-fifths of the States of the Union. In 31 of the 50 States, it is not necessary for a citizen to be literate in any language in order to vote. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45. It hardly seems worthy to consider any idea that the administration of government in those States is inferior to that in the States which do have such requirements. Of those 19 States which have such requirements, only 12 require literacy in English.

It also is plain that in those areas of the country where many people live who do not speak English, news media of various types are available to bring to them information in their native language concerning political developments, thereby making rational choices possible.

Our history reveals a steady extension of the franchise. When the Constitution was adopted, this right was limited to adult white males who were citizens and who possessed substantial real property. Since then, there have been continued extensions of the right. First, property qualifications were removed and then the ballot was extended to Negroes and women. Much has been heard lately about lowering the voting age. It seems that only literacy and other such tests run counter to this idea of the universal ballot.

F. EFFECT OF PROPOSED LEGISLATION ON MASSACHUSETTS LAW

We recognize that the passage of S. 480 would affect the Commonwealth of Massachusetts due to the fact that our voting qualification statute, Mass. Gen. Laws, c. 51, sec. 1, prescribes the ability to read the " * * * Constitution of the Commonwealth in English * * *" as one of the qualifications. However, in accordance with what has been said, we believe that the time has come for a reversal of this prescription and therefore support as constitutional and desirable this proposed legislation.

EDWARD J. MCCORMACK, Jr.,
Attorney General.

BOSTON, April 6, 1962.

DEAR SENATOR ERVIN: I have your letter of March 23, 1962, enclosing a copy of S. 2979 and in connection with it I refer you to page 15 of the opinion which I recently sent you in connection with S. 2750 and S. 480, wherein it is indicated that U.S. history shows a steady extension of the franchise.

My feeling is that such extensions are good for the country and accordingly we feel that S. 2979 is also both constitutional and desirable and I would appreciate it if you would make my position a part of the record of the hearings before the subcommittee.

With kindest personal regards, I am

Sincerely yours,

EDWARD J. MCCORMACK, Jr., *Attorney General.*

MICHIGAN

LANSING, March 9, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: I am in receipt of your recent letter in which you request my opinion on the legality of proposed Senate bill 2750 and Senate bill 480.

Senate bill 2750 purports to protect the right to vote in Federal elections free from arbitrary discrimination by literacy tests or other means. In the preamble the Congress finds, in part, that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color, and that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote. The bill then provides that a person shall not be deprived of his right to vote through the application of standards or procedures more stringent than are applied to others similarly situated, or when a person is denied the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such person has completed the sixth grade of any public or accredited private school.

In proposed Senate bill 480 the Congress would seek to prohibit the application of unreasonable literacy requirements with respect to the right to vote in

any election, State or Federal. The Congress would find that the right to vote of many persons has been subjected to arbitrary and unreasonable restrictions on account of race or color and that tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color. The bill would then provide that arbitrary or unreasonable test, standard or practice with respect to literacy shall mean any requirement designed to determine literacy in the case of any citizen who, being otherwise competent, has completed the sixth primary grade in a school accredited by any State or by the District of Columbia.

You ask my opinion relative to these bills in the following respects:

(1) Can the provisions of the bills be reconciled with the decisions of the U.S. Supreme Court passing upon the right of States to determine the qualifications of their electors?

(2) May Congress create a presumption in law that the completion of a sixth grade education is of itself proof of literacy without violating any constitutional provision?

Article III, section 1, of the Michigan constitution of 1908, prescribes the qualifications of electors in the State of Michigan. Briefly stated, a person must be above the age of 21 years, have resided in the State of Michigan for 6 months in the city or township in which he or she offers to vote 30 days next preceding such election, and be a citizen of the United States.

Consideration must also be given to article III, section 4, of the Michigan constitution of 1908, which states the qualifications of persons who may vote on questions of direct expenditure of money or bond issues.

In *Rentschler v. Detroit Board of Education*, 324 Mich. 603, the Michigan Supreme Court found persons qualified under article III, section 1, of the Michigan constitution of 1908, to be eligible to vote upon questions to increase the tax limitation. The court in its decision stressed that inasmuch as the constitution specifically provided the qualifications of electors voting on the proposition under consideration, such qualifications can neither be increased nor decreased by the legislature.

To the same effect is the decision of the Michigan Supreme Court in *Dearborn Township School District No. 7 v. Cahow*, 289 Mich. 643, which held that the legislature is without authority to change the qualifications of electors as set forth in article III, section 4, of the Michigan constitution of 1908.

There is no requirement for literacy tests prerequisite to voting in Michigan by law. From these authorities the conclusion is imperative that no literacy test could be enacted by our legislature without violating article III, section 1 of the Michigan constitution of 1908.

Article I, section 2 of the Constitution of the United States specifies that the electors in each State voting upon Members for the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The 17th amendment to the U.S. Constitution specifies that the electors for Members of the U.S. Senate shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The right of the States to determine the qualifications of their electors has been upheld by the U.S. Supreme Court on many occasions, most recently in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, where the Court upheld a literacy requirement of the State of North Carolina that specified as a requirement for a prospective voter to be able to read and write any section of the State constitution in the English language. The Court cited *Mason v. Missouri*, 179 U.S. 328, in support of its ruling, absent, of course, the discrimination which the constitution condemns.

I consider it significant that the court in its opinion in *Lassiter*, supra, recognized that a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot. Similarly, literacy test may be unconstitutional on its face. It should be noted that the record did not support in *Lassiter* any contention that a literacy test was employed to perpetuate that discrimination which the 15th amendment protects against.

It is beyond dispute that in some of the States within this great country large groups of persons who happen to share the same racial or colored background are not registered to vote and their efforts to exercise the right of franchise have been seriously inhibited. Reputable reports are available that persons possessing college degrees have been unable to satisfy local registrars that they are literate when they are asked to explain any section of the State constitu-

tion to the satisfaction of local election officials. There can be no question that many persons are denied the right to vote in violation of the 15th amendment by virtue of these literacy requirements.

The 15th amendment to the U.S. Constitution provides as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or *previous condition of servitude*. [Emphasis supplied.]

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

The U.S. Supreme Court in *Gomillion v. Lightfoot*, 364 U.S. 339, has held unconstitutional a State statute setting up new boundaries of a municipal corporation so as to deprive persons of their right to vote because of race, as violative of the 15th amendment. The Court stated on page 347 of the opinion as follows:

"When a State exercises power wholly within the domain of State interest, it is insulated from Federal judicial review. Such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right."

It must be observed in *Gomillion*, supra, was the right to vote in a local election, not a Federal election.

From these authorities I conclude that Congress may enact Senate bill 2750 or Senate bill 480 without violating any provision of the U.S. Constitution. Similarly, the power to enact the legislation would include the right to protect the vote of persons in State elections as well as Federal elections.

Assuming that either Senate bill 2750 or Senate bill 480 were adopted by the Congress, the declaration by Congress of the public evil set forth in the preface to the two Senate bills is evidence of a need for legislation to implement the 15th amendment to the U.S. Constitution, pursuant to power conferred by Congress under section 2 thereof.

The fixing of a sixth grade education as requiring a finding of literacy, in my opinion, is not irrational, and while it would not completely prevent discrimination, I am convinced that it will assist in the elimination of many abuses.

The right of Congress to establish statutory presumptions has been upheld in *Yee Hem v. United States*, 268 U.S. 178, and in *Casey v. United States*, 276 U.S. 413, so long as there is a reasonable relationship of the presumption to the facts.

In *Tot v. United States*, 319 U.S. 463, the U.S. Supreme Court disapproved of a congressional enactment on the ground that the inference was so strained as to not have reasonable relation to the circumstances of life as the Court knew him.

Under these authorities I am of the opinion that there is a rational connection between completion of a sixth grade education in a primary school and literacy. In the event that Congress should so declare by adopting either Senate bills, I cannot conceive of a court finding that there is no rational connection between the two. On the contrary, I am persuaded that literacy might well be connected with the completion of the third grade in the primary school, for example, rather than the sixth grade. The strength of our society is in the free and unfettered election in which all men, regardless of race or color, are equal at the ballot box. The 15th amendment is a shield to protect persons from discrimination in their right to vote because of race or color.

The enactment of Senate bill 2750 or Senate bill 480 would be a step forward in the fulfillment of the constitutional guarantee afforded by the 15th amendment.

I trust that my opinion on the questions raised in your letter will be of some assistance to your subcommittee. You may feel free to publish my opinion in your printed record.

Sincerely yours,

FRANK J. KELLEY, Attorney General.

MINNESOTA

ST. PAUL, March 22, 1962.

HON. SAM J. ERVIN, Jr.

Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SIR: In your recent letter you asked me as attorney general of Minnesota to give my opinions as to the constitutionality and desirability of two

Senate bills limiting the application of literacy tests as qualifications for voting. One of the bills would apply only to Federal elections, while the other would apply to all Federal, State, and local elections.

These bills both involve congressional findings (1) that it is essential to our form of Government that all qualified citizens have the opportunity to participate in the choice of elected officials; (2) that many persons have been subjected to arbitrary or unreasonable voting restrictions on account of their race and color and that literacy tests and other performance examinations have been used extensively to effect these arbitrary and unreasonable denials of the right to vote; (3) that the education in the United States is such that persons who have completed six primary grades in a public school or an accredited private school cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship; and (4) that a limitation on the use of literacy tests is necessary to make effective the guarantees of the Constitution, particularly those contained in the 14th and 15th amendments, by eliminating or preventing arbitrary and unreasonable restrictions on the franchise which occurred through the denial of the right to vote to persons with at least six grades of education, which exist in order to effectuate denials of the rights to vote on account of race or color. The bills would amend 42 United States Code 1971, which provides preventive judicial relief when a person is arbitrarily deprived of his voting rights. The bills would thus provide judicial relief for any arbitrary or unreasonable application of a literacy requirement, and declare it to be unreasonable to deny the right to vote on grounds of literacy to any person who has completed the sixth grade.

Free elections are the cornerstone of our democracy. Democracy can be maintained and will flourish only when no citizen is unreasonably or discriminatively denied the right to vote. It is therefore essential for the freedom and welfare of our citizens that our election processes be conducted without discrimination on the basis of race, color, creed, or national origin. This is even more true in the present world situation where our democratic way of life is in a great ideological battle with totalitarian communism. We are an example to all the people of the world and it is our obligation to show them that in our democracy every citizen is treated equally.

In keeping with this cornerstone of democracy, the 15th amendment to our Constitution states:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation."

This amendment places a duty upon the U.S. Congress to see that citizens of the United States are not denied the right to vote on account of race or color. If literacy tests are the means by which discrimination is accomplished, it is the duty of the Congress either to forbid the use of literacy tests as a qualification for voting or to put such restrictions on these tests so as to prevent them from being used in a discriminatory manner. The bills under consideration by the U.S. Senate take the latter course of action by restricting their use only to persons who have been judged incompetent or who have not finished the sixth grade in an accredited school.

It is well known that literacy, intelligence, or performance tests have traditionally been used as a means of discriminating against persons because of race or color. It is true that certain restrictions may be placed on the right to vote, such as age and residence. Although Minnesota has never seen the need for a literacy requirement, it is also possible that a nondiscriminatory literacy requirement for voters may have some justification. However, the tests as they are actually used in practice are open to flagrant abuse by those administering them. There is no objective standard, and the tests can deliberately be made so difficult that a university professor would "flunk." It is intolerable that such a requirement should be used for the purposes of discriminating because of race or color.

In this country, which has long put stress on the strong education system, it is inconceivable that a person who has completed six grades in this educational system should be deemed unqualified on the grounds of literacy, education, or intelligence. It is clear that any attempt to apply a literacy requirement to a person with such an education must be based on reasons other than literacy. Therefore, it would appear not only to be desirable but incumbent upon Con-

gress to take reasonable steps to prevent this abuse. The proposed bills, by prohibiting application of such tests to persons who have completed the sixth grade, would help prevent this abuse.

In your letter you cite some decisions of the U.S. Supreme Court which have upheld the broad powers of the State to determine the conditions under which the right of suffrage may be exercised. This power, however, is limited by the 14th and 15th amendments and any exercise of State power which by its terms or effect discriminates against a citizen on the basis of race or color is unconstitutional. You cite the case of *Lassiter v. Northampton Election Board*, 360 U.S. 45, which ruled that the North Carolina literacy test, applicable to all voters irrespective of race or color, was constitutional under these amendments. That case, however, was a direct challenge to all literacy requirements and the case did not raise the question of whether it had been applied in a discriminatory manner. We note that under the proposed bill, the States would still have a right to have a literacy requirement and it is only required that they do not use it in an unconstitutional manner.

There are several cases which have held that statutes nondiscriminatory in terminology are unconstitutional because of their necessary effect. See for example, *Guinn v. U.S.*, 238 U.S. 347; *Davis v. Schnell*, 81 F. Supp. 872, aff. 336 U.S. 933.

It is also clear that statutes which are otherwise constitutional may, through discriminatory application, result in an unconstitutional denial of a person's right to vote under the 14th and 15th amendments. Both from the general powers of Congress to enforce constitutional rights and from a specific grant of power in the 14th and 15th amendments to the Constitution, it is clear that these proposed bills would be constitutional if it is determined that they are appropriate to the protection of the constitutional voting rights of the citizens of the United States. It would appear beyond doubt in view of the past use of literacy requirements and the abuses involved by the application of those literacy requirements by local registrars, that the proposed bills are not only appropriate, but also essential to protect the citizens' right to vote. Moreover, since these bills are designed to protect the constitutional rights of the citizens of this country to vote, it would be essential to protect these rights not only in Federal elections, but also State and local elections. Under our Federal system, a citizen must be afforded the right to participate without discrimination in all elections. Constitutional rights must be fully protected at all times and in all situations. Protection only in certain elections does not satisfy the constitutional mandate. Since literacy tests are being used to deny constitutional rights of citizens to vote, it is essential that Congress take the appropriate action to protect this right not only in Federal elections, but also in all other elections.

Very truly yours,

WALTER F. MONDALE, *Attorney General.*

St. PAUL, April 18, 1962.

Hon. SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: Thank you for the opportunity to supplement my earlier comments regarding congressional action relating to voter qualification now that your committee is considering Senate bill 2979. For the reasons stated in my prior letter, I believe strongly that legislation to protect voting rights of citizens is a necessary and constitutional exercise of congressional power.

S. 2979 presents a sound approach to this problem. It states clearly the permissible qualifications which may be required of the voter. This bill is preferable to the prior bills about which I have already written to you. It takes the positive approach of stating permissible qualifications rather than simply limiting the use of a presently misused requirement. Thus, this bill not only prohibits the misuse of present requirements, but also will prohibit any future requirement which might be devised to discriminate against the right of minority groups to vote in any election.

I note that S. 2979 omits a provision found in the other bills regarding persons not under confinement who have been declared mentally incompetent. I favor this omission since such a provision could be misused to effect discrimination and for that reason any provision of this nature should be carefully qualified if it were included. Although it would seem reasonable to deny a mentally incompetent person the right to vote, it would appear that as a practical matter,

there would be few such persons who would attempt to vote. It is my opinion that the possibility of misusing a qualification relating to persons not in confinement, who have been declared mentally incompetent, outweighs the need for such a requirement.

I therefore strongly urge the passage of this bill.

Sincerely,

WALTER F. MONDALF, *Attorney General*.

NEVADA

MARCH 8, 1962.

HON. SAM J. ERVIN, JR.,
U. S. Senator, North Carolina, Chairman, Subcommittee on Constitutional Rights of Committee on Judiciary, Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: In response to your letter of February 7, 1962, asking our views in regard to the literacy requirements being considered in two bills, S. 2750 and S. 480, I enclose herewith a memorandum expressing the views of this office.

Very truly yours,

ROGER D. FOLEY, *Attorney General*.

MEMORANDUM, MARCH 8, 1962

I. THE CONGRESS HAS PLENARY POWER TO PASS LAWS CONTROLLING FEDERAL ELECTIONS

There was some doubt prior to the decision in *U.S. v Classic*, 313 U.S. 299 (1941), that the Federal Government could control the selection of electors and thereby the election of the President and Vice President. This case declared that where the Congress has enacted a law controlling Federal elections, an inconsistent State statute has no force and effect. The case of *Burroughs v. United States*, 290 U.S. 534 (1934), had earlier held that the Congress, under the authority of article I, section 4 of the Constitution, could pass a law controlling bribery and corrupt practices in the election of Representatives and Senators.

The power of Congress is plenary in the control of Federal elections under article I, section 4, except as to the place of holding the election. However, unlike some areas, the States are free to enact laws concerning the qualifications for suffrage. This is where the confusion has occurred since the Constitution gives no power to Congress to control the selection of presidential electors. *United States v. Classic*, *supra*, resolved this problem.

The resolution of these two concurrent powers is necessary here because the U.S. Supreme Court has recently held that a State may require that a voter qualify by taking a literacy test. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959).

The bills proposed here have the effect of superseding State legislation with respect to suffrage as to a selected portion of the electorate. There is little question now that the power exists as to Federal elections.

II. THE CONGRESS HAS THE POWER TO CONTROL CERTAIN ASPECTS OF STATE SUFFRAGE REQUIREMENTS

Here again the problem arises where the line is to be drawn separating State and Federal power in State elections. The leading case of *Guinn v. United States* (238 U.S. 347 (1914)), contained dicta to the effect that the motives of a State may not be inquired into in enacting a literacy test. However, in the later case of *Chapman v. King* (154 F. 2d 460 (1946), Cert. Denied 327 U.S. 800 (1946)), the U.S. Supreme Court in unequivocal terms stated that where the effect of any suffrage requirement is to deny suffrage to any person in violation of his rights under the 15th amendment, the requirement is unconstitutional. This protection has been invoked to strike down a gerrymandering of a municipal boundary, thereby protecting municipal voting rights. In *Gomillion v. Lightfoot* (364 U.S. 339 (1960)), the Court found an obvious purpose to disfranchise Negro voters. The 15th amendment was invoked.

The 15th amendment in section 2 gives the Congress of the United States power to pass suitable legislation to enforce the mandate of section 1.

A statutory method of preserving 15th amendment rights is proposed by Charles A. Horsky (at 20 Ohio St. L.J. 549 et seq.). He suggests a Federal Elec-

tion Board which is not open to some of the objections which could be made to the two bills in question here.

That Federal power is not plenary as to State elections is indicated by the case of *MacDougall v. Green* (335 U.S. 281 (1948)), wherein the State of Illinois was allowed to control new party formation on the theory that political diffusion was a State matter and not violative of the 14th amendment rights of those not allowed to form such a party. The Court distinguished this type of partial disfranchisement from that of the total disfranchisement which occurs in racial situations.

There is case law to the effect that racial discrimination in suffrage qualification may be reached under the protection afforded by the 14th amendment. *Davis v. Schnell* (81 F. Supp. 872, Aff'd. 336 U.S. 933 (1949)). This is not necessary due to the plenary nature of the 15th amendment power.

In summary, S. 480 is not vulnerable to the constitutional objection that the State's province is being invaded.

There is a 14th amendment case before the U.S. Supreme Court at present wherein the claim of violation is based on the alleged selection of candidates in such a manner as to racially discriminate. This should help clarify the role of the 14th amendment. *Assoc. For The Preservation Of Freedom Of Choice, Inc., v. Power* (docket No. 670 (N.Y. Sup. Ct., App. Div., 14 AD 2d (MEM) 596)).

III. FEDERAL LEGISLATION MAY NOT DISCRIMINATE ARBITRARILY OR UNREASONABLY

The Federal legislature is subject to the controls imposed by the fifth amendment. The due process clause of said amendment has been held to include the requirement that Federal legislation may not classify arbitrarily or unreasonably so as to discriminate against persons subject to such legislation. In *Steele v. Louisville & Nashville R.R. Co.* (323 U.S. 192 (1944)), the U.S. Supreme Court held that a bargaining agent under the Railway Labor Act was required to bargain for Negro as well as white members of a brotherhood. The theory was that any other interpretation would make the statute vulnerable to the objection mentioned above. In the later case of *Railway Express Co. v. New York* (336 U.S. 106 (1949)), the doctrine was reaffirmed and it is no longer questioned that Federal legislation must not discriminate except upon some reasonable differentiation fairly related to the object of regulation.

I have found no Federal case which discusses whether this restraint is wholly negative or whether it requires that affirmative rights be bestowed equally. The requirement of the 14th amendment has been construed to apply both negatively and affirmatively to States and it is likely that the Federal system is similarly constrained.

IV. AN ARBITRARY EDUCATIONAL STANDARD WHICH CONFERS AN ABSOLUTE FRANCHISE IS NOT SO UNREASONABLE A STANDARD AS TO VIOLATE THE NONDISCRIMINATION REQUIREMENTS OF THE FIFTH AMENDMENT

There is very little case law which directly deals with the control on the Congress which is implicit in the due process provisions of the fifth amendment. It is necessary, therefore, to resort to an ad hoc analysis using the broad standard expressed in the preceding section of this memorandum. With respect to the constitutionality of such a statute, the general rule should be applied. The universal approach to constitutional problems by the courts is that if there is any reasonable basis on which a statute may be upheld, it will not be declared unconstitutional.

The only question is whether the means is reasonably related to the end which the statute seeks to accomplish, assuming that the end itself is constitutional. The purpose of the present statutes is to secure the franchise for certain groups. The use of an arbitrary standard which may not be applied as a matter of discretion seems to be reasonably related to the legislative purpose. Based on this analysis, it is my opinion that the statute does not discriminate unreasonably and is, therefore, constitutional.

I have discussed the use of an arbitrary educational standard with the State superintendent of education and he has indicated that such a standard has certain objectionable features. I am sure that such objections have been made by others, but they are included here for the committee's possible use.

The fact of social promotions of slow learners and a small percentage of mentally retarded children is a matter of common knowledge among educators.

It has been estimated that as high as 20 percent of a given public school class may be thusly advanced. The reasons for this phenomenon are not critical here. The fact that it exists is critical.

Such vast differences within a given group of students are amplified by significant differences between regions. Pupils of the same age in different regions of the United States may vary 2 years in their academic level.

There is another large group of citizens which is not included in the group accorded rights and that is those naturalized citizens who received their education outside of the area delineated by these bills.

However, when these criticisms are considered in the light of the purpose of the bills, and the reasonable relationship of the means to the achievement of the end, I am of the opinion that they are not sufficient to make the bills unconstitutional. As a matter of legislation, the bills are underinclusive. As a matter of law, they do not appear to be so underinclusive as to be violative of the U.S. Constitution.

The following quotation from *Blue & Gold Stamps & Save Premium Co. v. Sobieski* (190 F. Supp. 133 (1961)) is a fair statement of the rule to be applied when the complaint of unconstitutional discrimination is made:

"A lack of abstract symmetry does not matter. The question is a practical one dependent (sic) upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if as a matter of fact, it is found that the danger is characteristic of the class named. The State may direct its law against what it deems the evil as it actually exists without covering the whole field of popular abuses."

V. THE SELECTION OF AN ETHNIC AND LANGUAGE GROUP FOR ABSOLUTE QUALIFICATION UNDER VOTER QUALIFICATION STATUTES REQUIRING A KNOWLEDGE OF THE ENGLISH LANGUAGE CONSTITUTES A DISCRIMINATION AS TO ALL PERSONS NOT SO QUALIFIED WHO ARE NOT MEMBERS OF THE SELECTED GROUP

The basic problems of reasonable classification and affirmative obligations of Federal legislation are present in the standards set forth in S. 2750. The basic question to be asked is why should Spanish language, non-English speaking citizens from Puerto Rico be classified and awarded a privilege not conferred on other non-English speaking citizens of the United States.

The early case dealing with racial discrimination under the 14th amendment is *Yick Wo v. Hopkins* (118 U.S. 356 (1886)). If the Federal Government by implication can be said to be bound by a similar negative restraint, can it be said that an affirmative right can be conferred so as to discriminate between citizens on the basis of race or ethnic group.

Equal protection of the laws is at best a difficult concept to apply so as to get a clear distinction in a case of this type. There is a sizable body of case law that states the requirement of equal protection as not requiring identity of treatment if there be reasonable ground for difference of policy. See: *Alliced Stores of Ohio, Inc. v. Bowers* (358 U.S. 522 (1959)).

With a standard of "reasonableness" as a guide, the decision becomes one of fact and judgment. In my opinion the classification proposed here is unreasonable as being "underinclusive."

The latest case which discusses the problem is not relevant on its facts, but it sets forth the aforementioned standards and states that the restraints on the Federal Government under the fifth amendment are no greater than those placed on the States under the 14th amendment. By implication this would seem to say that the requirements are at least as great. See: *Blue & Gold Stamps & Save Premium Co. v. Sobieski* (190 F. Supp. 133 (1961)).

MEMORANDUM, APRIL 5, 1962

I. S. 2070 REASONABLY CLASSIFIES THOSE PERSONS WHO ARE AUTOMATICALLY ENFRANCHISED BY VIRTUE OF QUALIFICATION UNDER THE EDUCATIONAL STANDARD SET FORTH IN SECTION 3

This bill is less objectionable on constitutional grounds than are S. 480 and S. 2750, although all three use the same educational standard. This bill includes a group of citizens who were excluded under the other two. Naturalized citizens whose education took place outside the United States are included and the bill is better legislation for that reason. The arbitrary educational level

was discussed in my previous memorandum and I do not feel it is necessary to repeat those comments here.

II. A RESTRICTIVE ENUMERATION OF VOTER QUALIFICATIONS IS INCONSISTENT WITH THE SUPREME COURT'S INTERPRETATION OF THE FEDERAL GOVERNMENT'S POWER IN ELECTIONS

The language of the bill which limits the criteria which a State may use to select voters is not consistent with dicta of *Lassiter v. Northampton County Board of Elections*, 300 U.S. 45 (1959). As I read this case, the enumeration of standards was permissive and not exclusive. If the assumption is made that there are no standards other than those enumerated in this bill, then the law of the case is not violated, however, I do not believe that this was the view of the U.S. Supreme Court. What these standards might be I cannot say at this point, but the States have a certain amount of constitutional leeway in the area of voter qualification and I feel that section 2 of the bill infringes upon this right.

III. A PRIVATE ACTION IN STATE ELECTIONS NOT BASED UPON THE RACE, COLOR OR CONDITION OF PREVIOUS SERVITUDE OF THE PARTY AFFECTED IS NOT WITHIN THE SCOPE OF FEDERAL POWER

As I read section 4 of S. 2979, action of private individual not acting under color of law is sought to be controlled. That the Federal legislature may do this with respect to the following areas is no longer disputed: (1) Federal elections with respect to State and individual action under the rule of *United States v. Classic*, 313 U.S. 200 (1941); (2) State elections where State action is involved under the 14th amendment; (3) State and Federal elections where State or individual action is involved under the 15th amendment.

However, there is a small area where the Federal Legislature is without power to act. This is the area of private individual action in State elections where the act arises out of some cause other than the race, color or condition of previous servitude of the party acted upon. If I let the air out of my neighbor's tire, because I know which way he is going to vote thereby hoping to gain some political advantage, this does not create a basis for Federal action, but rather one for local law enforcement. This objection may be de minimis due to the obvious purpose of the bill to secure 15th amendment rights in certain geographical areas, but as a matter of constitutional theory the bill is too extensive in its scope in this respect. The exclusion of this area of operation of the bill would have very little to do with the avowed purpose of this legislation, but would remove an area of possible controversy.

NEW MEXICO

SANTA FE, February 16, 1962.

HON. SAM J. ERVIN, Jr.
United States Senator,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: In response to your letter of February 7, 1962, concerning Senate bills 2750 and 480, I wish to refer you to section 3 of article 7 of the New Mexico Constitution which reads as follows:

"The right of any citizen of the State to vote, hold office, or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution; and the provisions of this section and of section one of this article shall never be amended except upon a vote of the people of this State in an election at which at least three-fourths of the electors voting in the whole State, and at least two-thirds of those voting in each county of the State, shall vote for such amendment."

Under the provisions of the above there can be no literacy tests in New Mexico in connection with the elective franchise. Therefore, in view of our constitutional provision and the 17th amendment to the Constitution of the United States, it is our view that neither of the above referred to acts would make any change in the elective franchise in New Mexico as it now exists. In

view of this status in New Mexico I trust that I may be excused from further comment with reference to the bills.

Sincerely,

EARL E. HARTLEY, *Attorney General.*

NEW YORK

ALBANY, March 27, 1962.

Re Senate 2750 ; Senate 480.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Your letter enclosing copies of the above captioned bills advises me that your subcommittee invites my views on the constitutionality and desirability of these bills.

I appreciate very much your thoughtfulness in sending me the bills and regret the delay in answering your letter. The delay is accounted for by the pressure of the peak of our legislative session.

I would say first that I believe most deeply and earnestly that every citizen of the United States should be afforded an equal opportunity to vote for those who govern us. There should be no conditions upon the exercise of this fundamental right of the citizen which would have the effect of denying it in a discriminatory manner; no irrelevant qualifications; no qualifications which are not wholly necessary. The report of the U.S. Commission on Civil Rights for 1961 indicates that denials of the right to vote in some States occur by reason of discriminatory application of laws, not only in regard to literacy of the voters but by reason of registration procedure and other qualifications. Still other denials occur by reason of threats and intimidation or the fear of retaliation. Any such practices which prevent the true expression of the people's choice in any manner should be severely condemned and the necessary machinery set up in the laws of our country and States to prevent discriminatory practices of any kind.

As to the bills before you, upon serious consideration I find that I should refrain from comment. I am confident that you will understand the reasons. They are these:

The constitution and election law of the State of New York providing the qualifications of voters, make certain provisions in respect to literacy and the procedure for proof thereof. These provisions differ from those in the bills before your committee. I have but recently appeared in support of the provisions of our constitution and election law in a litigation which challenged them. (*Camacho v. Rogers, et al.*, U.S. District Court, Southern District of New York, Oct. 20, 1961.) It seems to me that it would be inappropriate for me at this time to comment on proposed legislation which would differ from the laws which I must defend in my position as attorney general of the State of New York.

Moreover, as the chief legal adviser of the State, it is my statutory duty to pass upon the constitutionality and validity of legislative enactments before the Governor for executive action. Among the bills being considered in the current legislative session are amendments to the New York constitution and the New York election law in respect to literacy qualifications of voters.

Accordingly I feel that I should not express my views upon the pending Federal bills.

Sincerely yours,

LOUIS J. LEFKOWITZ, *Attorney General.*

NORTH CAROLINA

RALEIGH, March 13, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Complying with your request of the 5th of February 1962, I enclose herewith my statement with respect to the Senate bills referred to in your letter. You have permission to insert these views in the printed record.

With highest regards, I am,
Sincerely yours,

T. W. BRUTON, *Attorney General.*

STATEMENT OF T. W. BRUTON, ATTORNEY GENERAL OF NORTH CAROLINA

My name is T. W. Bruton, and I reside in Raleigh, N.C., where I exercise the duties of attorney general of North Carolina, having been elected by the people to this office.

This statement relates to S. 2750 and S. 480, which are now pending upon hearings before the Senate Subcommittee on Constitutional Rights.

The Constitution of the United States in some instances recognizes that there are such things or such governmental bodies as States and also recognizes that the States have some authority on the question of suffrage. For example: Article I, section 2, clause 1 of the Federal Constitution, states: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Amendment XVII of the Federal Constitution in its first paragraph provides as follows: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

It is true that article I, section 4, clause 1, provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

It is believed, however, that the power granted to Congress under the provision quoted immediately above relates to the manner of conducting elections, the duties of election officials, penalties, and penal offenses, suppression of fraud and maintaining peace in such elections. It is not believed that the provisions in this section above quoted vest in Congress the power to provide for reasonable qualifications which persons must possess to exercise the right of suffrage. As to the power of Congress, see: *Ex parte Siebold*, 100 U.S. 383; and see also: *United States v. Gale*, 109 U.S. 66.

It is well settled that it is within the power of the States to provide qualifications as to conditions precedent to voting and also to provide for the orderly administration of the suffrage privilege for the purpose of preventing fraud. See: *United States v. Cruikshank*, 92 U.S. 542, 555, 23 L. ed. 588; *Minor v. Happersett*, 88 U.S. 162, 170, 22 L. ed. 627; *Mitchell v. Wright*, 69 F. Supp. 698, 703; *United States v. Reese*, 92 U.S. 214, 217, 23 L. ed. 563; *Davis v. Schnell*, 81 F. Supp. 872, 876; aff'd. 336 U.S. 933, 93 L. ed. 1093; *Trudeau v. Barnes*, 65 F. 2d 563; cert. den. 290 U.S. 659; *Snowden v. Hughes*, 321 U.S. 1, 7 88 L. ed. 497.

Suffrage is a political right reserved and retained by the States subject to Federal constitutional limitations against arbitrary and discriminatory practices. The right to vote is a political right and is not on a parity with so-called civil rights, vested rights or property rights, and the right of suffrage is not conferred by the U.S. Constitution. It is derived from the States under their constitutions and statutes. See: *Pope v. Williams*, 193 U.S. 621, 48 L. ed. 817; *United States v. Cruikshank*, 92 U.S. 542, 555, 23 L. ed. 588; *Mason v. Missouri*, 179 U.S. 328, 335, 45 L. ed. 214; *Minor v. Happersett*, 88 U.S. 162, 172, 173, 22 L. ed. 627; *Breedlove v. Suttles*, 302 U.S. 277, 283, 82 L. ed. 252; *Smith v. Blackwell*, 34 F. Supp. 989, aff'd 115 F. 2d 186.

S. 480 clearly violates constitutional rights which have been reserved to the States in suffrage matters. The act undertakes to impose its arbitrary standards on all types of elections which may be held in a State. Its arbitrary standards would relate to State, county, and municipal elections, where no Federal office is even at stake. It imposes an arbitrary standard of the completion of the sixth primary grade in a school accredited by any State or the District of Columbia. The imposition in this bill of a single arbitrary standard is contrary to the scope of power given to the States in suffrage matters and as interpreted by the Supreme Court of the United States.

The case of *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 3 L. ed. 2d 1072, 79 S. Ct. 985, came from the State of North Carolina, and this opinion affirmed the opinion of the Supreme Court of North Carolina, and the Supreme Court of the United States, by unanimous decision, Douglas, J., delivering the opinion of the court, made the following judicial statements:

"* * * While the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U.S. 651, 663-665; *Smith v. Allwright*,

321 U.S. 649, 661-662) it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315 * * *.

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction * * *. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show * * *. In our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise * * *.

"The present (North Carolina) requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot." (Parentheses added.)

Reasonable literacy tests to determine qualifications for voting have been consistently held constitutional. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898); *Davis v. Schnell*, 81 F. Supp. 872, 876 (1949), aff'd 336 U.S. 933 (1949). See also *Allison v. Sharp*, 209 N.C. 477 (1936). In 1955 there were 19 States with constitutional or statutory requirements of literacy as a qualification for exercise of suffrage: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Mississippi, North Carolina, New Hampshire, New York, Oklahoma, Oregon, South Carolina, Washington, Wyoming, and Virginia—31 Notre Dame Lawyer 255 et seq.

Other decisions of the Supreme Court of the United States support this position, and in this connection, see the following cases: *Guinn v. United States*, 238 U.S. 347, 360, 35 S. Ct. 932; *Williams v. State of Mississippi*, 170 U.S. 213, 18 S. Ct. 533, 42 L. Ed. 1012; *Davis v. Schnell*, D.C., 81 F. Supp. 872, aff'd 336 U.S. 933, 69 S. Ct. 749, 93 L. Ed. 1093; *Trudeau v. Barnes*, 5 Cir.; 65 F. 2d 563, cert. den. 290 U.S. 659, 54 S. Ct. 74, 78 L. Ed 571.

In *Guinn v. United States*, supra, the Supreme Court of the United States said that the establishment of a literacy test "was but the exercise by the State of a lawful power vested in it not subject to our supervision."

It is our opinion that S. 480 is but another attempt to deprive the States of their rightful powers. It represents, also, the philosophy of those who think that minority groups can do no wrong and that the organized voting power of such groups renders lawful anything that such groups desire. It also represents the concepts and thinking of those who believe that everyone should be reduced to the lowest common denominator and that there is no inherent right to be unequal. It represents the thinking that has been characterized by the great Spanish philosopher, Ortega y Gasset, in his book, "The Revolt of the Masses," W. W. Norton Co., Inc. (New York) when he said:

"The characteristic of the hour is that a commonplace mind, knowing itself to be commonplace, has the assurance to proclaim the rights of the commonplace and to impose them wherever it will. As they say in the United States: 'To be different is to be indecent.' The mass crushes beneath it everything that is different, everything that is excellent, individual, qualified, and select. Anybody who is not like everybody, who does not think like everybody, runs the risk of being eliminated."

S. 2750 is in much the same terms as S. 480 except it only undertakes to regulate Federal elections. It imposes the same arbitrary standard as to the literacy test; that is, completion of the sixth primary grade, and regardless of the truth it finds that Spanish-language news sources qualify citizens as to information for the intelligent exercise of the franchise. This again is a violation of the powers reserved to the States, for, as we have already pointed out, Congress has not been given the right to provide or add to the States reasonable standards or qualifications imposed upon those who exercise the right of suffrage.

Both of these bills violate the recognition that the Constitution of the United States clearly recognizes as being vested in the States as to qualifications of voters, and they violate the decisions of the Supreme Court of the United States.

Respectfully submitted,

T. W. BRUTON,
Attorney General of North Carolina.

RALEIGH, March 26, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Complying with your request of the 23d of March 1962, I enclose herewith my supplementary statement with respect to the Senate bills referred to in your letter. You have permission to insert these views in the printed record.

With highest regards, I am,
Sincerely yours,

T. W. BRUTON, *Attorney General.*

STATEMENT OF T. W. BRUTON, ATTORNEY GENERAL OF NORTH CAROLINA

My name is T. W. Bruton, and I reside in Raleigh, N.C., where I exercise the duties of attorney general of North Carolina, having been elected by the people to this office.

I have, heretofore, made a statement in which I discussed the provisions of S. 2750 and S. 480, and this statement is made in the form of a brief discussion of S. 2979 and as a supplement to the statement I have already filed with the Subcommittee on Constitutional Rights of the Committee on the Judiciary.

In my former statement I attempted to show that by express recognition appearing in the Constitution of the United States and that by decision of the Supreme Court of the United States reasonable qualifications for the exercise of the right of suffrage, or voting, for all offices whether Federal, State, county, or municipal lies within the scope of the powers exercised by the States as a constitutional division of government of this Nation. These conditions for suffrage must be reasonable and must be administered in a nondiscriminatory manner.

The provisions of S. 2979 represent another effort to take away from the States the right to impose and prescribe reasonable conditions or qualifications for voting in order to please certain minority groups. The argument that the provisions of S. 2979 are but mere administrative regulations of the right of suffrage is not even clever or subtle. The provisions, if enacted, would be applicable to State offices as well as to Federal offices and would still retain the arbitrary completion of six or more grades of formal education as a satisfaction of any literacy test enacted by the States. Moreover, the provisions of this bill would give the right of suffrage to a vast army of criminals who have been guilty of cumulative and successive crimes involving moral turpitude, none of which, however, have been nominated as felonies. The fact that there may have been some abuse in the administration of reasonable voting qualifications does not mean that such qualifications should be destroyed for any law that requires administration can be subject to abuse.

It is believed that it can be pointed out that some Federal laws have been subject to abuse by Federal officers, and it should not be forgotten that all Federal officers in nearly all instances come from States, and it is not believed that by some mystical process or metamorphosis they become clothed with sanctity and infallibility because they become Federal officers.

It is a mistake to believe that States are not interested in securing the right of suffrage from unreasonable administration. As an example, see the case of *Bazemore v. Board of Elections* (254 N.C. 398; — S.E. 2d —), where the Supreme Court of North Carolina held that a county board of elections had required excessive reading and writing of the Constitution and that a writing of a provision of the Constitution by dictation could not be required.

There is also a contradiction in the bill in that section 2(a) (1) permits voting in all cases except as to inability in age requirements; inability as to residence requirements; legal confinement at the time of the election or registration; and conviction of a felony. Nowhere in this section is there anything said about a reasonable requirement as to a literacy test. It is true that in section 3 a literacy test is mentioned and completion of the sixth grade is the arbitrary standard for this test, but any Federal court could reasonably say that a literacy test is not required under this bill and that persons meeting all the requirements of section 1 would be allowed to vote.

The gentlemen who have introduced this bill should have the moral courage, character and fortitude to plainly and honestly say that they wish for the States to be abolished except as a mere election district so that they can be elected to office.

NORTH DAKOTA

BISMARCK, February 21, 1962.

Hon. SAM J. ERVIN, Jr.,
 Chairman, Committee on the Judiciary,
 Subcommittee on Constitutional Rights,
 U.S. Senate, Washington, D. C.

DEAR SENATOR ERVIN: We have your letter of February 7, 1962, wherein you state that in view of the possible effect of these bills on State laws, that is, laws with reference to the rights of voters, it would be of great assistance to the subcommittee to have my opinion on the constitutionality and desirability of these measures.

Your proposed bill provides in part as follows:

"The Congress, therefore, further finds and declares that the enactment of this Act is necessary to make effective the guarantees of the Constitution, particularly those contained in the fourteenth and fifteenth amendments, by eliminating or preventing arbitrary and unreasonable restrictions on the franchise which occur through the denial of the right to vote to persons with at least six grades of education and which exist in order to effectuate denial of the right to vote on account of race or color."

In other words the question is, under these provisions of the proposed statute can a person who has not attained a sixth grade education vote at an election?

The Federal Supreme Court in the case of *Lassiter v. Northampton County Board of Elections* (360 U.S. 45, 3 L. Ed. 2d 1072, 79 S. Ct. 985), stated as follows:

"A North Carolina statute, applicable to members of all races, requires that a prospective voter be able to read and write any section of the Constitution in North Carolina in the English language. Plaintiff, a Negro, having been denied registration as a voter because of her refusal to submit to the literacy test required by the statute, appealed to the county board of elections, and, at a de novo hearing, again refused the literacy test and was again denied registration. She appealed to the superior court, Northampton County, N.C., which sustained the board as against the claim that the requirement of the literacy test violated the 14th, 15th, and 17th amendments to the Federal Constitution. On appeal, the North Carolina Supreme Court affirmed (248 N.C. 102, 102 S.E. 2d 853).

"On appeal, the U.S. Supreme Court affirmed the judgment below. Douglas, J., speaking for the unanimous Court, held that no constitutional defect inhered in the North Carolina statute, on its face, since a State may properly conclude that only those who are literate should exercise the franchise."

You will notice that on page 1077 of 3 L. Ed. it provides as follows:

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347, 33 L. Ed. 637, 641, 642, 10 S. Ct. 299) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. (Cf. *Franklin v. Harper*, 205 Ga. 779, 55 S.E. 2d 221, app. dismd. 339 U.S. 946, 94 L. Ed. 1361, 70 S. Ct. 804.) It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. (*Stone v. Smith*, 159 Mass. 413, 414, 34 N.E. 521.) North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards."

Thus the Supreme Court of the United States has held that where the person has received education sufficient to read the constitution of the State, he will be entitled to vote. If he cannot read, he cannot vote.

You will notice that the question involved is illiteracy and the intelligence of a person to vote and under the Federal Constitution such test is decided to be a valid test. You will notice that the test of a voter to know what he is voting for and the test of having a sixth grade education are entirely different matters. A person need not have a sixth grade education in order to vote intelligently;

that is, to vote on questions understood by him. When the test is made that he shall pass the sixth grade, it is entirely different and uncertain and indefinite. There is nothing to prevent a school board from fixing the necessity of having the sixth grade education to learn his example in algebra and Latin, and it would seem to the writer that a person would be intelligent to vote without being efficient in algebra and Latin.

Our constitution is very liberal and sections 122 and 127 read as follows:

"Section 122. The legislative assembly shall be empowered to make further extensions of suffrage hereafter, at its discretion, to all citizens of mature age and sound mind, not convicted of crime, without regard to sex; but no law extending or restricting the right of suffrage shall be in force until adopted by a majority of the electors of the state voting at a general election."

"Section 127. No person who is under guardianship, non compos mentis, or insane, shall be qualified to vote at any election; nor shall any person convicted of treason or felony unless restored to civil (social) rights; and the legislature shall by law establish an educational test as a qualification, and may prescribe penalties for failing, neglecting or refusing to vote at any general election."

You will notice that section 127 states that the legislature shall by law establish an educational test as a qualification. That statement is very indefinite and we doubt very much that if the legislature should see fit to provide for a statute like you have proposed, that the Court would uphold such law. We, therefore, doubt very much that your proposed statute would be held constitutional by the Court.

Yours very truly,

J. A. HYLAND, *Assistant Attorney General.*

OREGON

SALEM, March 1, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senator,
U.S. Senate Building, Washington, D.C.

DEAR SENATOR ERVIN: I believe that S. 480 and S. 2750 demand a careful scrutiny into their constitutionality. I regret that due to the smallness of our staff and the volume of our workload we are unable to research this question.

I regret that I have not had the opportunity to study S. 480 and S. 2750 as thoroughly as I would like.

It seems to me the right of the States to define the qualifications of electors, as prescribed by the U.S. Constitution, is a value calling for vigilance and protection.

At the same time the right of every qualified elector to cast his ballot freely and to have his vote count in full measure is essential to the perpetuation of our democratic institutions.

Very truly yours,

ROBERT Y. THORNTON,
Attorney General.

PENNSYLVANIA

HARRISBURG, March 13, 1962.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Receipt is acknowledged of your letter of February 7, 1962, addressed to my predecessor in office.

I must confess that at first I approached the task of replying to your letter with some trepidation, since I have considerable doubts as to whether the expression of an opinion on my part as to the constitutionality of proposed Federal legislation lies properly within the functions and duties allotted to the attorney general of the Commonwealth of Pennsylvania. The Pennsylvania Administrative Code of 1929 specifies that the attorney general is the chief law enforcement officer of the Commonwealth and that he give advice to the Governor and to the departments, boards, and commissions of the Commonwealth. In these circumstances, it appears doubtful whether any official significance could be attached to the expression of an opinion of the kind you request.

Unofficially, however, I am happy to give you my views with respect to the very interesting constitutional questions presented by S. 2750 and S. 480. Neither of these bills, if enacted, would create any problem for the Commonwealth of Pennsylvania, since there is no statutory bar in Pennsylvania to the free exercise of the franchise. Pennsylvania does not have a poll tax or any literacy or educational qualifications. Nor to my knowledge has there been any attempt, official or otherwise, to disfranchise any individual or any segment of the electorate. In fact, the Pennsylvania Legislature has recently provided for absentee ballots for residents who are out of the Commonwealth or confined to home by illness on election day.

Undoubtedly, as you point out, the Constitution has conferred certain powers on the States with respect to the electoral process, and the U.S. Supreme Court in the *Pope* (103 U.S. 621); *Mason* (179 U.S. 328); *Guinn* (238 U.S. 347), and *Lassiter* (360 U.S. 45), cases, which you cite, as well as in numerous other cases, has recognized these powers. The Supreme Court has also recognized the jurisdiction of the Federal Government to prevent the use of State election machinery to deny citizens their constitutional rights. See *Lassiter* and *U.S. v. Classic* (313 U.S. 299). The Federal civil rights laws have been sustained as valid legislation implementing and providing means for the enforcement of constitutional rights. See *Screws v. U.S.* (325 U.S. 91).

Where the Federal Government legislates in a field in which both State or Federal Governments have a legitimate and proper interest, the Federal legislation supersedes that of the State if the two are incompatible. See *Commonwealth v. Nelson* (350 U.S. 497). Under the supremacy clause, S. 2750 or S. 480 would supersede any State legislation establishing different and incompatible requirements for franchise.

As early as 1879, in *Ex parte Siebold* (100 U.S. 371, 382-384), the U.S. Supreme Court, through Mr. Justice Bradley, recognized that Congress may, if it chooses, assume the entire regulation of the election of representatives. Modern commentators have recognized the basis of such plenary congressional powers as resting not only in section 4 of article I of the Constitution and in the 14th and 15th amendments, but also in the "necessary and proper" clause of section 8 of article I of the Constitution and the "supremacy" clause of article VI (see, e.g., 46 Va. L. Rev. 945, 951 (1960); 48 Cal. L. Rev. 190, 190-197 (1960); 20 Ohio S. L. J. 549, 553-555 (1959)).

While the constitutionality of the administration bill may be predicated on several or all of the aforementioned bases of congressional power, the constitutionality of the Javits bill, insofar as it pertains to State elections, can be specifically predicated on the power conferred on Congress by the 14th and 15th amendments to secure the rights provided for in those amendments.

For the reasons previously stated, this letter cannot be considered an official opinion or even an informal opinion of the attorney general of Pennsylvania. I hope that my views with respect to the impact of these bills on Pennsylvania election laws and practice will be of assistance to the committee. I am happy to comply with your request and grant permission to quote this communication in the printed record should you deem it appropriate.

With all good wishes to you.

Sincerely yours,

DAVID STAHL, Attorney General.

HARRISBURG, PA., March 28, 1962.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 22, 1962, acknowledging receipt of my letter concerning S. 2750 and S. 480 and for your letter of March 23, 1962, enclosing a copy of S. 2979 for my comment.

A cursory study of S. 2979 persuades me that it would be in the proper exercise of its power for Congress to pass this bill, on the same grounds and for the same reasons indicated in my earlier letter.

With all good wishes to you.

Sincerely yours,

DAVID STAHL, Attorney General.

RHODE ISLAND

PROVIDENCE, February 9, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: This will acknowledge receipt of your letter of February 7, 1962, with reference to the proposed Federal legislation dealing with literacy treatment for voters.

I have studied the contents of your letter carefully as well as the copies of the two bills proposed in the U.S. Senate, and I must respectfully suggest that, in my opinion, both of these bills are in conflict of spirit and letter of the constitution of this State with reference to voting requirements.

The Rhode Island Constitution contains no literacy requirements of any nature whatsoever for voters. As I read the two bills submitted with your letter, there is at least an implication contained in both as to a requirement that a person must have completed the sixth primary grade in order to be assured of his right to vote. In all frankness, I cannot agree with such a policy, but rather, I believe that the constitution of Rhode Island properly treats the matter of voting rights by containing no literacy requirements whatsoever.

Trusting that the above may be of some assistance to you, I remain,
 Respectfully yours,

J. JOSEPH NUGENT, *Attorney General.*

SOUTH DAKOTA

PIERRE, March 8, 1962.

Mr. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate,
Washington, D.C.

DEAR MR. ERVIN: Enclosed herein is a copy of the constitution of South Dakota, article VII of which deals with voting qualifications. As can be seen upon analysis of article VII, this State has no literacy requirements. Thus, Federal legislation concerning such would have no effect on the voters of South Dakota.

Yours very truly,

A. C. MILLER, *Attorney General.*

ARTICLE VII. ELECTIONS AND RIGHT OF SUFFRAGE

SEC. 1. Every person resident in this state, who shall be of the age of twenty-one years and upwards, not otherwise disqualified, belonging to either of the following classes, who shall have resided in the United States five years, in this state one year, in the County ninety days, and in the election precinct where such person offers his vote thirty days next preceeding any election, shall be a qualified elector at such election provided; that no elector in the state by reason of having changed his residence from one county or precinct to another shall be deemed to have lost his right to vote at any election in the precinct from which he has moved until he shall have acquired a new voting residence in the county or precinct to which he has removed.

First. Citizens of the United States.

Second. Persons of foreign birth, who have become naturalized citizens conformably to the laws of the United States, upon the subject of naturalization. (As amended November 1958, pursuant to Ch. 304, Laws of 1957.)

SEC. 2. The legislature shall at its first session after the admission of the state into the union submit to a vote of the electors of the state the following question to be voted upon at the next general election held thereafter, namely: "Shall the word 'male' be stricken from the article of the constitution relating to elections and the right of suffrage." If a majority of the votes cast upon that question are in favor of striking out said word "male," it shall be stricken out and there shall thereafter be no distinction between males and females in the exercise of the right of suffrage at any election in this state.

SEC. 3. All votes shall be by ballot but the legislature may provide for numbering ballots for the purpose of preventing and detecting fraud.

SEC. 4. All general elections shall be biennial.

SEC. 5. Electors shall in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and in going to and returning from the same. And no elector shall be obliged to do military duty on the days of elections, except in time of war or public danger.

SEC. 6. No elector shall be deemed to have lost his residence in this state by reason of his absence on business of the United States or of this state, or in the military or naval service of the United States.

SEC. 7. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed therein.

SEC. 8. No person under guardianship, non compos mentis or insane, shall be qualified to vote at any election, nor shall any person convicted of treasons or felony be qualified to vote at any election unless restored to civil rights.

SEC. 9. Any woman having the qualifications enumerated in Section 1 of this article as to age, residence and citizenship, and including those now qualified by the laws of the territory, may vote at any election held solely for school purposes and may hold any office in this state, except as otherwise provided in this constitution.

UTAH

SALT LAKE CITY, March 15, 1962.

SAM J. ERVIN, JR.,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This will acknowledge receipt of your letter of February 7, 1962, in which you invite my comments concerning S. 2750 and S. 480, relating to qualifications and literacy requirements for the exercise of the voting franchise. I have examined both bills and have attempted to appraise them in the light of the questions to which you sought inquiry in your letter.

First, I have extreme doubts as to the constitutionality of both of these measures. As you have noted in your letter, the U.S. Constitution provides, pursuant to article I and the 17th amendment, that Members of Congress shall be elected by electors who have the qualifications that are the same as those provided for the selection of the State legislature. A similar provision for President and Vice President is found in the 12th amendment. It seems clear, then, that the States are left to determine the qualifications of those persons who exercise the electoral franchise even as to Federal elections.

The present bills will usurp, to a great degree, the discretion of the State to establish its own qualifications for electors. It is, of course, well within the jurisdiction of the Federal courts and the Congress to take steps to avoid improper racial discrimination in voter qualifications. *Wixon v. Herndon*, 273 U.S. 536; *Wixon v. Condon*, 286 U.S. 78. However, the Supreme Court has indicated, as you correctly point out, in *Lassiter v. Northampton Election Board*, 360 U.S. 45, that literacy tests equally applied, irrespective of race or color, are not unconstitutional and are within the discretion of the State legislature. It would appear, then, that unless the qualifications imposed by the State are being improperly applied or are discriminatory upon their face, that the Federal legislation would, by virtue of the Constitution, be subordinated to any State legislation.

I, therefore, feel that since the proposed legislation is extremely broad in its possible application, that it may run afoul of the U.S. Constitution. I believe that the provisions of the present Civil Rights Commission legislation, where the matter of voter discrimination can be directly dealt with, offers a better alternative than the proposed bills submitted to the Senate; first, because the great majority of States have no racial discrimination in the exercise of the elective franchise; secondly, those few minority States that do have some discrimination do not require such broad legislation as the two bills under consideration, and the strengthening of the Civil Rights Commission or other more direct procedure would better correct the problem.

As to the question of the standards applied in the bill, I am of the opinion that it is a reasonable presumption that a person who has finished the sixth grade is literate, so that there would be no constitutional objective on the basis of the presumption itself. However, I think it is well within the sound discretion of the appropriate State legislature to provide other standards which would be more effective in actually determining a voter's qualifications. I note that the bills

exclude only those persons who have been adjudged incompetent. Since adjudication procedures vary greatly from State to State, it may well be that some persons who are adjudged incompetent may well be qualified to vote, and some persons who have not been adjudged incompetent should be deprived of the franchise. For this reason, I would feel that a more definitive exploration of incompetency is in order.

The bills provide that reading and writing of the English language should not be a criteria in determining the qualifications for exercise of the franchise. I would strongly disagree with the recited statement in S. 2750 that there are sufficient Spanish or other foreign language periodicals available to apprise a citizen of the important and cogent issues in an election. In addition, a substantial number of States provide that certain matters to be voted on by the citizens of their State shall be published in an English language newspaper. This, undoubtedly, would lead to a splitting of ballots and substantial confusion. I do not feel that it is too much to ask that a person be able to read and write the English language in order to be granted the franchise. A workable democracy depends upon a highly informed and intelligent electorate. Participation in voting by great numbers is also important, but if those persons participating are not informed of the real issues involved, the democratic processes are nonetheless undermined.

In summary, I feel that there is a constitutional objection to these bills. I further feel that if legislation is deemed necessary to correct discriminatory practices in the election process, that a bill more directly related to the correction of the abuses is the appropriate way to proceed, with penalties being provided for willful discrimination and with easy access to the courts to enforce arbitrary denials.

Finally, I am of the opinion that the present proposed legislation creates as many problems as it would solve. For example, it would allow the very arbitrary determination that persons with less than 6 years' formal education are illiterate and thus, in some areas, provide an excellent lever to continue discriminatory practices.

Very truly yours,

A. PRATT KESLER, *Attorney General.*

SALT LAKE CITY, March 28, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your kind letter of March 22, 1962, relating to my comments on S. 480 and S. 2750. In reference to your letter of March 23, 1962, requesting my views on S. 2079, which was attached thereto, I have given that bill close attention.

At the outset, let me say that I think section 2(a) is of questionable constitutionality, first, since the Federal Constitution expressly leaves the qualifications for voting up to the States. The fact that a Federal office is the subject of election does not change the constitutional mandate allowing the States to establish voter qualifications. I would agree, of course, that a State may not establish any qualifications for the right to vote which are arbitrary or discriminatory against any race, creed, or color, and for this reason I would have no objection to section 4, subsection (b) of the bill. In fact, I would heartily endorse its passage and I feel that the recognition of inaction, as well as active participation as a cause of discrimination, is a good step in the right direction. However, the four qualifications set out under section 2 appear to be in conflict with the implicit allowance of a literacy test as set out under section 3.

Thus, the bill, on its face, is subject to confusion and open to interpretation which can always be used for ulterior motives. Even so, I note that the four definitive qualifications under subsection (b) of section 2 are certainly not all the reasonable restrictions that could be validly imposed before allowing the exercise of the electoral franchise. For example, if a person were placed under guardianship due to incompetency, but not confined, and if he had had 6 years of formal education, he could not be denied the right to vote under the terms of your bill, although a person under guardianship may well not be a competent voter and could be easily subjugated to the influence of his guardian.

In addition, the same objection applies to this bill constitutionality-wise as applied to the others. That is, as long as a State established reasonable quali-

fications under its own law and did not arbitrarily apply them, the Federal Constitution provision for election according to the established qualifications for the State, would allow the State law to be federally superimposed over the Federal law, and anything in conflict with State law in the Federal statute would be void.

Once again I feel that this bill undermines our constitutional balance of State and Federal power, and does so for the sake of a few minor States which would undoubtedly be able to use other means to accomplish their ends.

I still am of the opinion that a direct active attack by the Civil Rights Commission with the right of the individual voter to seek vindication in the courts, either with the assistance of the Federal and State attorneys general or on his own, offers the surest way of combating the evil recognized by the bills.

Best wishes.

Very truly yours,

A. PRATT KESLER, *Attorney General.*

VERMONT

MONTPELIER, February 19, 1962.

HON. SAM J. ERVIN, JR.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SIR: Your letter of February 7 addressed to Thomas Debevoise, as attorney general of this State, has come to my attention by reason of my succeeding Mr. Debevoise in this office.

Your letter relates to the activities of the Senate Subcommittee on Constitutional Rights concerning two bills which in turn relate to literacy requirements as conditions for voting.

This State has nothing by way of such requirements in its statutory law and it would not seem to me appropriate at this time for us to give consideration to the constitutionality and desirability of the bills you have under consideration.

We appreciate the opportunity you have given us for comment and hope that you understand our reason for declining to consider the bills in the light of their constitutionality and desirability.

Very truly yours,

CHARLES J. ADAMS, *Attorney General.*

VIRGINIA

RICHMOND, February 28, 1962.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights, U.S. Senate, Washington, D.C.

MY DEAR SENATOR ERVIN: In accordance with the request in your letter of February 7, 1962, relative to S. 2750, I am enclosing a memorandum of the views of this office in regard to this bill. No specific reference was made to S. 480. The objections to S. 2750 apply also to S. 480 and, of course, S. 480 has the additional objection that it applies to all elections, State as well as Federal.

You have authority to use this memorandum in any way desired by you, including insertion in the printed record, if you feel it is desirable to do so.

I do not understand your letter of February 27, 1962, in which you acknowledged receipt of material furnished you in regard to these bills, as this memorandum is the first that this office has sent you.

With kind regards and best wishes, I am.

Sincerely yours,

ROBERT Y. BUTTON, *Attorney General.*

MEMORANDUM RE S. 2750

Senate bill 2750 provides that no person, whether acting under color of law or otherwise, shall be subjected to a deprivation of the right to vote in a Federal election.¹ "Deprivation of the right to vote" is interpreted in the bill as mean-

¹ A Federal election is defined by the bill as an election for President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions.

ing the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school * * *." As indicated in the preliminary portions of the bill, one of the major purposes of its enactment is to outlaw State literacy tests now required of prospective voters. The proponents of the bill rely for congressional authority upon article I, section 4 of the Constitution, giving Congress the power to regulate "the times, places and manner of elections"; upon the 14th amendment and its privileges and immunities, equal protection, and due process clauses; and upon the 15th amendment mandate that no State shall deny to its citizens the right to vote solely upon conditions of race, color, or previous condition of servitude.

This memorandum will establish that none of the portions of the Constitution relied upon confer upon Congress the power to enact S. 2750.

ARTICLE I, SECTION 4

While it is true that article I, section 4 permits Congress to regulate the times, places and manner of holding elections for Senators and Representatives, it is also true that this language is ambiguous. It is difficult to tell specifically what are those items which may be regulated by Congress. The ambiguity is eliminated to some extent by article I, section 2, and the 17th amendment, which provide that in the elections of Senators and Representatives, "the electors (voters) in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." In other words, the States shall establish qualifications which must be met by prospective voters. Under this clause, the States have established literacy tests and other requirements which have been upheld by the U.S. Supreme Court.²

Aside from the fact that the Supreme Court has upheld the exercise of State power in this area, it is true that the authors of the Constitution contemplated that the States should have all constitutional authority, and the Federal Government should have no power, to set voter qualifications. Alexander Hamilton, speaking of the power to establish voter qualifications, stated: "this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. [Emphasis in original.] The qualifications of the persons who may choose or be chosen, as has been remarked on other occasions, are defined and fixed in the Constitution, and are unalterable by the (national) legislature."³

There have been a great many other occasions on which courts, legislators, and congressional committees have commented to the same effect,⁴ but Hamilton's statement is perhaps the clearest one which may be used as an example to illustrate the complete lack of congressional authority in the area of voter qualification.

THE 14TH AMENDMENT

As to the power of Congress to enact legislation pursuant to the provisions of the 14th amendment, the Supreme Court has said "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing * * *."⁵

Thus if the State laws as to literacy, poll taxes, and related requirements are prohibited by the 14th amendment, Congress is authorized to enact S. 2750 to counteract those State laws. But if the State laws are constitutional, Congress lacks the power necessary to enact S. 2750.

² Literacy test: *Lassiter v. Board of Supervisors*, 360 U.S. 45 (1959). Poll tax: *Breedlove v. Suttles*, 302 U.S. 277 (1937).

³ The Federalist No. 60, at 402 (Wright ed. 1961) (Hamilton). [Emphasis added.]

⁴ *Ex parte Yarbrough*, 110 U.S. 651, at 663 (1884); *Guinn v. United States*, 238 U.S. 347, at 366 (1915); H.R. Rep. No. 3,000, 56th Cong., 2d sess. (1901); Cong. Globe, 27th Cong., 2d sess., 349 appendix (1842) (remarks of Mr. Clifford of Maine); note, 3 Race Rel. L. Rep. 390 (1952); Corwin, "The Constitution of the United States," 1172 (Legislative Reference Service, Library of Congress, 1952).

⁵ *Civil Rights Cases*, 109 U.S. 3, 13 (1883). [Emphasis added.] See also, *United States v. Harris*, 106 U.S. 629, at 639 (1883).

State literacy tests and poll taxes have been upheld as constitutional.⁶ As recently as 1959, Mr. Justice Douglas, speaking for a unanimous Court, stated that "in our society * * * a State might conclude that only those who are literate should exercise the franchise."⁷

Since the Supreme Court is of the unanimous opinion that literacy tests are constitutional exercises of State power, no State is prohibited from enacting laws providing for such tests. Therefore Congress has no authority to declare void these State laws. It is proper to point out that the Supreme Court, not Congress, is charged with the responsibility of determining the constitutionality of State laws.

THE 15TH AMENDMENT

The Supreme Court has said that the 15th amendment does not confer on Congress authority "to impose penalties for every wrongful refusal to receive * * * (a) vote * * * (but) only when the wrongful refusal is because of race, color, or previous condition of servitude."⁸

Or in other words, if a State's laws regarding voter qualification are constitutional, there is no power in Congress to declare these laws void by passing conflicting legislation. The situation is almost identical with the situation under the 14th amendment. State literacy tests and poll taxes have been held not to be violations of the 15th amendment.⁹ It necessarily follows that, since the States are not constitutionally prohibited from passing such laws, there is no power in Congress to enact conflicting legislation. It should be noted that 19 States, most of them non-Southern States, have enacted laws requiring literacy tests of prospective voters.¹⁰ It is recognized that if these State laws go beyond the provisions of the 15th and 19th amendments, they are unconstitutional.¹¹ But in this regard it is again emphasized that the responsibility for determining the constitutionality of these laws is in the Supreme Court, not in the Congress.

PRESIDENTIAL ELECTIONS

With regard to presidential elections the Constitution provides: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."¹²

The words "in such manner as the legislature thereof may direct," are conclusive upon the question here under consideration.¹³ The only authority of Congress in this regard is to "determine the time of choosing the electors, and the day on which they shall give their votes * * *."¹⁴ It is without question true that, in presidential elections even more than in congressional elections, the power of the States to determine all aspects of the procedure, including voter qualifications, is superior to any other legislative authority.¹⁵

CONCLUSION

Senate bill 2750 is an unnecessary proposal, because all the States currently have laws governing exercise of the franchise. If these laws are in any way oppressive, citizens of the States may petition their State legislatures for redress. It is error to assume that the Congress can better establish voting requirements in the several States than can the legislatures of those States. The proposed legislation is, therefore, logically unsound.

In addition, S. 2750 is constitutionally unsound. Article I, section 4 of the Constitution confers on Congress no power to establish qualifications for voters, and article I, section 2 absolutely denies that Congress is to have such power. Neither the 14th nor the 15th amendment confers on Congress the power to void

⁶ See note 2, *supra*. See also *Williams v. Mississippi*, 170 U.S. 213 (1898).

⁷ *Lewis v. Board of Supervisors*, 360 U.S. 45, 52 (1959).

⁸ *United States v. Reese*, 92 U.S. 214, 218 (1876).

⁹ See notes 2 and 6, *supra*.

¹⁰ See 3 *Race Rel. L. Rep.* 390 (1958), for a listing of the States and the applicable statutes.

¹¹ *Quinn v. United States*, 238 U.S. 347 (1915); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala., 1959).

¹² U.S. Constitution, art. II, sec. 1, cl. 2.

¹³ *McPherson v. Blacker*, 146 U.S. 1 (1902).

¹⁴ U.S. Constitution, art. II, sec. 1, cl. 4.

¹⁵ *Wilkinson, "The Electoral Process and the Power of the States,"* 47 A.B.A.J. 251, at 251 (1961). See *In re Green*, 134 U.S. 377 (1890).

existing State laws. Since the Supreme Court has declared these State laws constitutional, Congress lacks authority to pronounce them unconstitutional.

It follows that Senate bill 2750 should be rejected by the Subcommittee on Constitutional Rights.

MEMO REGARDING S. 2979; SPECIFICALLY, AS COMPARED WITH S. 2750

Senate bill 2979 differs from S. 2750 in one major respect: it would grant to the Federal Government power to establish qualifications for those who vote in State elections. At the very least, this is an astounding proposition, as reason would dictate that each State should administer its own political system. But the fact that this proposition is offered not as a constitutional amendment, but as a simple act of Congress, can only produce amazement in the mind of anyone who has never read the Constitution. To quote Alexander Hamilton, a man whose dedication to a system of strong Central Government cannot be questioned:

"Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment * * *" (The Federalist No. 59, at 395 (Wright ed. 1961) (Hamilton)).

Hamilton's language was strong, even when he addressed himself to the question of a constitutional provision which would give Congress the power asserted in S. 2979. Since the Constitution does not give Congress that power, but on the contrary expressly denies the power, the tenor of Hamilton's language must be doubled in intensity in rejecting S. 2979. Thus the proposed legislation not only is beyond the constitutional power of Congress; it must be, according to Hamilton, "a premeditated engine for the destruction of the State governments."

With regard to the authority of Congress to enact this legislation pursuant to provisions of the 14th and 15th amendments, it is necessary only to examine briefly arguments advanced in the previous memorandum concerning S. 2750. The power given Congress to enforce the provisions of the 14th and 15 amendments is not all inclusive. The only laws Congress may pass in this regard are those "counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing."—*Civil Rights cases* (109 U.S. 3, 13 (1883)). The above quotation applies specifically to the 14th amendment. Identical logic may be found regarding the 15th amendment in *United States v. Reese* (92 U.S. 214, 218 (1876)).

State required literacy tests, poll taxes, age limits, and other similar qualifications have time and again been upheld by the Supreme Court as not violative of the 14th or the 15th amendment. Thus the laws which S. 2979 seeks to counteract are not prohibited by the amendments. It follows that there is no authority in Congress pursuant to these amendments to enact S. 2979.

PRACTICAL OBJECTIONS

S. 2979 is open to a number of practical objections which immediately meet the eye. At page 2, line 24, the bill begins a list of items which still may be legislated upon by the States. Item (1) authorizes reasonable age requirements. Who has final authority to define "reasonable"? The Supreme Court of the United States. Similarly, under item (2), that Court must finally determine what is a reasonable residence requirement. The result must be that the Supreme Court will establish a substantial portion of local election codes. Surely this was not envisioned by the authors of the Constitution or any of its amendments.

Item (3) provides that one legally confined at the time of registration or election may be denied the franchise. But paupers, persons convicted of a multitude of election frauds, and a great many others who are now denied the franchise by State law must be admitted to the polls.

Section 3 of the bill purports to leave the States some discretion in establishing literacy tests, but in effect it eliminates all reasonable literacy tests now required by the States. By requiring that any citizen who has completed the sixth grade be permitted to vote in any Federal or State election, the bill completely ignores the fact that a person may complete the sixth grade and thereafter become incompetent to exercise the franchise. This is an example of the

type of intricate problem which can best be handled at the lower levels of government. There are many similar problems which have been handled by the States since the formation of the Republic, and which the States would be precluded from handling under the provisions of S. 2979.

CONCLUSION

Senate bill 2979 is inherently bad regarding Federal elections for all the reasons set forth in the previous memorandum from this office regarding S. 2750. Insofar as S. 2979 purports to deal with qualifications of voters in elections for State officers, there is no semblance of power in Congress to enact the proposed law. Very simply stated, the Constitution does not grant Congress any power in this area, and without such a grant of power, Congress has no authority to act.

WISCONSIN

MADISON, March 1, 1962.

Re Bills S. 480 and S. 2750.

HON. SAM J. ERVIN, JR.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Senate Office Building, Washington, D.C.*

DEAR SENATOR ERVIN: This is in reply to your letter of February 7 requesting my opinion on the constitutionality of the two above captioned bills relating to literacy tests for voting.

Inasmuch as Wisconsin has no literacy test and the constitution of this State does not authorize the enactment of any such test, the two Senate bills in question do not in any way affect this State. Neither do the provisions relating to other arbitrary deprivation of the right to vote have any significance so far as this State is concerned.

Therefore the constitutional issue raised by your letter is not a matter of concern to this office and I have no official reason to interest myself in the matter.

In view of the fact that my staff and I are greatly overburdened with litigation and other matters pertaining to the duties of this office and it would require considerable research to answer your question, I respectfully decline to express an opinion.

I wish to thank you for the opportunity which you have extended to express an opinion, and I assure you that if the matter were of concern to this State I should be most happy to comply with your request.

Sincerely yours,

JOHN W. REYNOLDS, *Attorney General.*

SURVEY OF OPINIONS OF CONSTITUTIONAL LAW PROFESSORS

LETTER FROM SENATOR SAM J. ERVIN, JR., SUBCOMMITTEE CHAIRMAN,
REQUESTING OPINIONS FROM CONSTITUTIONAL LAW PROFESSORS

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
February 8, 1962.

DEAR PROFESSOR: The Senate Subcommittee on Constitutional Rights is presently considering two bills relating to literacy requirements as conditions for voting. One of these is S. 2750, the administration bill, and the other is S. 480, introduced by Senator Javits. It is anticipated that public hearings on these bills will be held in March.

In view of the constitutional ramifications of these bills, it would be of great assistance to the subcommittee to have your opinion, as a professor of constitutional law, concerning the constitutionality and desirability of these measures.

As you will note S. 2750 proposes various congressional findings regarding the right to vote; the denial of that right to some persons; the sufficiency of a sixth grade education as basis for a literacy requirement; the lack of proficiency in English as ground for denial of the franchise; and the power of Congress, under article I and the 14th and 15th amendments of the Constitution, to legislate on these matters.

Section 2 of S. 2750 would amend section 1971, title 42, United States Code, which provides for preventive judicial relief when a person is arbitrarily deprived of his voting rights. In connection with the right to vote for national officers, the bill in effect adds as grounds for such court action: (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated; and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if that person has not been adjudged incompetent and has completed the sixth primary grade of any public or accredited private school in any State or territory, the District of Columbia, or Puerto Rico.

S. 480 contains similar provisions which would apply to all elections, State as well as Federal.

Provisions of the Constitution, as you know, spell out the power of the States to establish voter qualifications. Under article I, and the 17th amendment, the electors for Senators and Congressmen in each State "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Under article II and the 12th amendment, the President and Vice President are to be elected by electors who must be chosen in each State "in such manner as the legislature thereof may direct."

Numerous decisions by the U.S. Supreme Court in such cases as *Pope v. Williams* (193 U.S. 621), and *Mason v. Missouri* (179 U.S. 328) have upheld the broad powers of the State to determine the conditions under which the right of suffrage may be exercised. Three years ago the Supreme Court, in *Lassiter v. Northampton Election Board* (360 U.S. 45), ruled that a North Carolina literacy test applicable to all voters irrespective of race or color was constitutional under the 14th and 17th amendments. In its unanimous opinion, the Court cited its ruling in *Guinn v. U.S.* (238 U.S. 347), that the establishment of a literacy test "was but the exercise by the State of a lawful power vested in it not subject to our supervision."

In your opinion, can the provisions of the bills before the subcommittee be reconciled with these holdings and with the applicable provisions of the Constitution? On a related issue, the subcommittee would also be interested in your comments on the constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently.

The subcommittee will appreciate receiving, prior to the beginning of the hearings, the benefit of your views regarding these questions. It would also appreciate authorization to insert your expression of views in the printed record.

Thanking you for your assistance in our study, and with all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, Jr., *Chairman.*

ALABAMA UNIVERSITY LAW SCHOOL

March 5, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Dean M. Leigh Harrison has referred to me your letter of February 12, soliciting an opinion concerning the constitutionality of proposed Federal legislation to establish literacy requirements as conditions for voting.

In my judgment, the 14th and 15 amendments clearly give Congress power to enact literacy requirements such as those provided in either S. 480 or S. 2750 if it determines that the proposed findings of fact as recited in the first section of each bill are true, i.e. that various forms of literacy requirements have been and are being employed by the States arbitrarily to deny voting rights.

I do not consider that the Supreme Court decisions to which you referred present any obstacle to the validity of legislation along these lines. The general principle that voting rights are "derived from" the States, as articulated in

Pope v. Williams (193 U.S. 621), and *Mason v. Missouri* (170 U.S. 328) is not drawn in question by this proposed legislation. Nor does the declaration in *Quinn v. U.S.* (238 U.S. 347) that the establishment of a literacy test "was but the exercise by the State of a lawful power vested in it not subject to our supervision" apply to render these bills invalid because, in the first place, these proposals are for congressional action in the exercise of a clearly granted constitutional power rather than for Federal judicial supervision of an unrestricted State prerogative. Furthermore, it has now been established beyond any reasonable possibility of misunderstanding that a dictum such as that in the *Quinn* case concerning power vested in the States so as not to be subject to supervision must be read and understood as not impairing the effectiveness, under the supremacy clause, of Federal constitutional limitations on State power, whether those limitations be self-executing in nature or subject to implementation by action of Congress. This point is well illustrated in the 1900 decision of *Gomillion v. Lightfoot* (364 U.S. 339) in which generalities from previous decisions "expressing the States' unrestricted power * * * to establish, destroy, or reorganize by contraction or expansion of its political subdivisions" were used as a basis for claiming that the State was at liberty to gerrymander municipal boundaries in such a way as to deny Negroes equal participation in municipal affairs. In overruling this argument, the Court observed that "to exalt this power (of the States) into an absolute is to misconceive the reach and rule of this Court's decisions * * *". The Court there held that State action having to do with a subject, i.e. local government, the general control of which is concededly vested in the States, was invalid where it violated the 14th and 15th amendments. There is nothing to the contrary in the 1959 case of *Lassiter v. North Hampton Election Board* (360 U.S. 45), since that case was in terms no more than a ruling on the validity of State literacy tests on their face. Principles outlined above were in fact emphasized by the following expression of the court in that case: "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot. No such influence is charged here."

Since Congress has been granted the constitutional power to enforce the prohibition against denial of equal protection of the laws (14th amendment) and the prohibition against denial of voting rights on account of race or color (15th amendment), the problem is entirely one of the choice of an appropriate means with which to implement a constitutionally authorized objective. Although theoretically the court is at liberty to disagree with Congress' findings concerning the factual need for and justification of its actions (See *Chastleton Corp. v. Sinclair*, 264, U.S. 543), in view of the developing pattern of Supreme Court deference to the judgments of Congress as well as the fact that the opinion is widely held that facts recited in the first sections of S. 480 and S. 2750 are true, it appears very unlikely that the Supreme Court would rule that there is no factual basis for congressional action in this field, at least if the statutory findings of fact are reasonably documented with evidence supplied to and reported by the committee. Assuming factual justification for the exercise of congressional powers under the 14th and 15th amendments, the uniformly applicable completion-of-sixth-grade schooling test would appear to be a reasonable means to prevent manipulation and abuse of literacy requirements. In view of the latitude which Supreme Court decisions afford Congress in the matter of the choice of efficient means with which to pursue constitutionally authorized ends (see *Turner v. Texas*, 310 U.S. 141, and *Perez v. Brownell*, 356 U.S. 44), it is not to be expected that the Supreme Court would hold that S. 480 and S. 2750 make use of impermissible means.

You have my permission to publish my views as expressed in this letter in the records of Congress.

Sincerely yours,

O. DALLAS SANDS, Professor of Law.

UNIVERSITY, ALA., March 28, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I have your letter of March 23, asking me to supplement my comments concerning the constitutionality of pending bills S. 480 and S. 2750 by giving my views regarding the constitutionality of S. 2979. After reviewing S. 2979, I am satisfied that my original remarks concerning S. 480 and S. 2750 apply also to this bill.

Sincerely yours,

C. DALLAS SANDS, *Professor of Law.*

BOSTON COLLEGE LAW SCHOOL

BRIGHTON, MASS., March 20, 1962.

Hon. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights, Committee on the Judiciary, United
States Senate, Washington, D.C.

DEAR SENATOR ERVIN: I have your letter in which you ask my opinion as to the constitutional validity of S. 480 and S. 2750, now pending before your committee.

My judgment is that ample authority in the Congress to enact either bill is found in Section 2 of the 15th amendment.

You will recall that the Supreme Court, speaking of the 15th amendment, said in *Lane v. Wilson*, 307 U.S. 268, 275, and reiterated last term in *Gomillion v. Lightfoot*, 364 U.S. 339, 342, "The amendment nullifies sophisticated as well as simple-minded modes of discrimination." The congressional findings recited in both bills are determinations that literacy tests, as administered in some places, constitute "sophisticated" modes of the sort of discrimination forbidden by section 1 of the 15th amendment.

I see nothing in *Lassiter v. Northampton Election Board*, 360 U.S. 45 to prevent the Congress from making an effective finding to this effect. The Court there ruled that the literacy test in question was not discriminatory on its face. Thus, the question posed by that case is entirely different from that which would have been before the Court had Congress exercised its power to legislate with respect to literacy tests for voters.

If Congress sees fit to make the findings recited in the bills, the scope of its regulatory power is to be determined according to the classic standard described by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, i.e., it can prescribe anything which it considers "necessary and proper" to prevent denial or abridgment of a citizen's right to vote on account of race, color, or previous condition of servitude. I would hesitate to say that the setting of a uniform literacy standard is not "necessary and proper" as a means of eliminating a subtle device of voter discrimination.

Sincerely,

JOHN D. O'REILLY, Jr., *Professor of Law.*

CHICAGO-KENT COLLEGE OF LAW

CHICAGO, ILL., February 16, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Senate Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

MY DEAR SENATOR ERVIN: I have your letter of February 12, 1962, requesting my opinion on the constitutionality of S. 2750 and S. 480, bills to establish compliance with State-created literacy requirements by completion of the sixth grade for purposes of voting in Federal elections, in respect to the first-named bill, and in all elections in respect to the second-named bill, transmitted to me as professor of constitutional law at this school. In my opinion, these bills are patently beyond the constitutional power of Congress to enact.

The cases of *Lassiter v. Northampton Election Board*, 360 U.S. 45, *Guinn v. United States*, 238 U.S. 347, *Pope v. Williams*, 193 U.S. 621, and *Mason v. Missouri*,

179 U.S. 328, are ample authority for the proposition that State-created literacy requirements violate no Federal constitutional provision. Of course, these cases do not, in and of themselves, directly deal with the power of Congress to legislate on this subject. However, other authorities are persuasive that no such right can be found in the Constitution.

When the Constitution was first adopted, each State had diverse qualifications for suffrage, and almost all had property qualifications of one sort or another. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 172-173. The Federal Constitution created no voters, for as *Minor v. Happersett* observed, "The United States has no voters of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters."

Universal male suffrage was a considerable time in coming in some States. For example, the constitution of New York of 1821, article 2, section 1, limited the franchise, in general, to taxpayers, and strongly discriminated against Negroes, who alone were required to possess a freehold estate of \$250 above all incumbrances to vote at any election. In Rhode Island, property in land was necessary to vote until 1843, and it took a virtual revolution and near civil war to change the rule and institute universal male suffrage. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 35 (1849). During all of this period, it was never asserted that the U.S. Congress or any Federal constitutional provision could, or did, alter State voting rules. As Chief Justice Taney said in *Luther v. Borden*, 48 U.S. at pages 40-41, "And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualifications of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given."

Nothing in the Constitution of the United States provided a different rule for suffrage in Federal elections. Article I, section 2, provides that "Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in voting for members of the House of Representatives, while the 17th amendment makes the same provision for U.S. Senator. Article II, section 1, provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President and Vice President. These provisions vest in Congress no power to prescribe voting qualifications, and this omission cannot be deemed an oversight, for when the framers of the Constitution desired to give Congress power to alter State rules in respect to elections of Federal officials, they found no difficulty in doing so, as illustrated by article I, section 4, which permits Congress to alter State laws in respect to the times, places, and manner of holding elections for Senators and Representatives "at any time by Law."

Nor can it be argued that the 14th or 15th amendments altered this rule. When the House originally passed the 15th amendment, the Senate amended the House version of the original proposed 15th amendment to ban discrimination based on nativity, property, and education. The House of Representatives thereupon defeated this amended version by a vote of 37 to 133, with only 37 Representatives voting in favor of the amended version and 133 against it. Congressional Globe, 40th Cong., third sess., February 15, 1869, page 1220. Thereupon, the Senate receded from its amendment. *Id.*, at page 1329. The ultimate conference report contained the present text of the 15th amendment. *Id.*, at page 1623. During the debates on this in the Senate, it was repeatedly stated, with some complaint, that the Senate was giving way to the House. *Id.*, at page 1639.

Manifestly, it is futile to argue that the 15th amendment was mere surplusage, and that the 14th amendment was intended to encompass a restriction on State voting qualifications. And it is equally at war with reason that Congress, after having expressly deleted a provision banning educational qualification from the amendment, should have intended that the watered-down version which finally became the 15th amendment should encompass a provision which had been expressly deleted. The same members of Congress proposed the 14th and 15th amendment, and it is preposterous to believe that extensive debate should be conducted over a provision already covered by some other enactment. It is clear that the deletion of the educational voting restriction ban forecloses any congressional action in this field. A State will be well within its constitutional prerogatives to provide that none but those who pass the eighth grade, or high school, or college, or law school, or who can read English, or Latin, or Greek, can vote at Federal or State elections.

Authority most contemporaneous with the 15th amendment agrees with this interpretation. In *United States v. Cruikshank*, 92 U.S. 542, 555 (1875), the Supreme Court declared: "In *Minor v. Happersett*, 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states."

Another useful authority of the period is "A Treatise on the American Law Of Elections" (1875), by George W. McCrary, of the Iowa bar, a Member of the House of Representatives and then former chairman of the Committee of Elections of the House of Representatives. He declares in the book, at page 7:

"Subject to the limitation contained in the 15th amendment to the Constitution of the United States, the power to fix the qualifications of voters is vested in the States. Each State fixes for itself these qualifications, and the United States adopts the State law upon the subject, as the rule in Federal elections, as will be seen by reference to section 2 of article I of the Constitution."

He likewise declares at page 9:

"The right of suffrage is not a natural right, nor is it an absolute, unqualified personal right. It is a right derived in this country from constitutions and statutes. It is regulated by the States, and their power to fix the qualifications of voters is limited only by the provisions of the 15th amendment."

The only case I have found dealing directly with Congress' power over State voting qualifications is *United States v. Miller*, 107 Fed. 913, 915-6 (D. Ind., 1901), wherein the court declared:

"Before the adoption of the 15th amendment, it was within the power of the State to exclude citizens of the United States from voting on account of race, age, property, education, or on any other ground however arbitrary or whimsical. The constitution of the United States, before the adoption of the 15th amendment, in no wise interfered with this absolute power of the State to control the right of suffrage in accordance with its own views of expediency or propriety. It simply secured the right to vote for Members of Congress to a definite class of voters of the State, consisting of those who were eligible to vote for members of the most numerous branch of the State legislature. Further than this, no power was given by the Constitution, before the adoption of the 15th amendment, to secure the right of suffrage to anyone. The 15th amendment does not in direct terms confer the right of suffrage upon anyone. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the States still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency. * * * (107 Fed. 913, 915 C.D. Ind. 1901).

"But section 5507 is not limited to the deprivation of the right of the colored man to vote on account of race, color, or previous condition of servitude. It makes it an offense to deprive any colored man of his right to vote, even when such deprivation does not occur on account of race, color, or previous condition of servitude. If the section is valid, the ground of the deprivation becomes wholly immaterial. But it seems to me to be clear that Congress is not granted power to make such deprivation criminal except in the single instance of a discrimination on account of race, color, or previous condition of servitude. If the right of the colored man to vote is interfered with on any other ground, the State alone can punish the violator of that right. The Congress can go no further than to protect him against discrimination where such discrimination occurs on account of race, color, or previous condition of servitude. The power of Congress to enact this section is bottomed solely upon this amendment. The effect of article 1, section 4, of the Constitution in respect to the election of Senators and Representatives is not here involved. Nor can it be invoked to support the validity of the section in question. As we have said, this section is bottomed solely on the 15th amendment. It cannot be successfully contended that the amendment confers authority to impose penalties for every conceivable wrongful deprivation of the colored man's right to vote. It is only when the wrongful deprivation is on account of race, color, or previous condition of servitude that Congress may interfere and provide for its punishment. If, therefore, the section in question goes beyond that limit, it is unauthorized by the amendment. That the section does go beyond that limit is plainly evident, because it makes every deprivation of the colored man's right to vote penal, whether such deprivation is or is not on account of race, color, or previous condition of servitude. There are no words of limitation in this section of the statute. The court is not authorized

to read the words of limitation found in the 15th amendment into the section * * *. The demurrer to the indictment must be sustained."

In accord with the above case, see *McKay v. Campbell*, 16 Fed. Cas. 157, No. 8,839 (D. Ore., 1870), at page 160, which is to the same effect and is contemporaneous with the 15th amendment.

I might note that S. 2750 is unconstitutional for still another reason, and would be so even if confined to the District of Columbia where Congress has plenary power to legislate. It is reasonable to require literacy in English for voting since the overwhelming amount of information about the Government is printed in that language and accordingly a person who cannot read English is barred by language barrier from obtaining most of the information about what his voice will affect, and accordingly such a classification or discrimination is a reasonable one. However, if the limited information obtainable about governmental activities is deemed enough by Congress for intelligent voting, which is obtainable from the Spanish-language press, then there is no rational grounds of discrimination against persons literate in Hebrew, Yiddish, Italian, Polish, German, etc., since, in the northern metropolitan areas where such persons are concentrated, there are as many newspapers in those languages as there are printed in Spanish. Accordingly, this unreasonable discrimination against other foreign-language groups violates the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In sum, it is my opinion that the bills are unconstitutional. You may use this letter in any fashion you like.

Very truly yours,

ALFRED AVINS,
Associate Professor of Law.

CHICAGO, ILL., March 29, 1962.

HON. SAM J. ERVIN, Jr.,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 23.

For the reasons stated in my previous letter, I am of the opinion that S. 2979 is beyond the constitutional competence of Congress to enact.

Should any comments of mine be added to the committee record, I would much appreciate receiving a copy of the committee record with these comments.

With thanks for soliciting my views, I am,

Very truly yours,

ALFRED AVINS,
Associate Professor of Law.

CREIGHTON UNIVERSITY LAW SCHOOL

OMAHA, NEBR., March 6, 1962.

HON. SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SIR: Your letter to the professor of constitutional law, enclosed in your letter of February 12, 1962, to Dean James A. Doyle, was passed on to me. Please note that the views expressed in this letter are my own and do not necessarily reflect the views of The Creighton University.

S. 480 provides, in effect, that in any election conducted under State or territorial authority in any State or territory, or in any of its political subdivisions, a citizen of the United States otherwise qualified may not be subjected to a literacy test if he has completed the sixth primary grade in a school accredited by any State or by the District of Columbia.

Unquestionably, the States have broad powers to determine the conditions under which the right of suffrage may be exercised. However, the right to vote for U.S. Congressmen and Senators is established and guaranteed by article 1, section 2 and the 17th amendment of the Constitution, which provide that the officials shall be chosen by the people, and that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Thus the States cannot directly prescribe the qualifications of such electors. They prescribe the qualifications of electors for the most numerous branch of the State legislature, but the Constitution adopts the qualifications so prescribed as the qualifications for electors for Congress and Senators. "It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend

exclusively on the law of the State." *Ex Parte Yarbrough*, 110 U.S. 651, 663-664 (1884). See, also, *United States v. Classic*, 313 U.S. 290, 315 (1941); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959). "[W]hile the right of suffrage is established and guaranteed by the Constitution * * * It is subject to the imposition of State standards which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. *Lassiter v. Northampton County Bd. of Elections*, *supra* at p. 51. (Emphasis supplied.)

In any event, whenever a State prescribes the qualifications for voters it is subject to the 14th amendment's equal-protection clause. *Pope v. Williams*, 193 U.S. 621 (1904); *Lassiter v. Northampton County Bd. of Elections*, *supra*. "Congress may, pursuant to section 5 of the 14th amendment, legislate to prevent States and their officials from enacting or enforcing statutes which deny equal protection of the laws." *Larche v. Hannah*, 177 F.S. 816, 820, *rev'd on other grounds* 363 U.S. 420 (1960). In addition, Congress has the power under article I, section 8, clause 18.

In the *Pope* case, *supra*, the Court upheld a Maryland statute requiring that a person coming into the State to reside should make a declaration of intent to become a citizen and resident of the State a year before he should have the right to be registered as a voter of the State. In the *Lassiter* case, *supra*, the Court held that a literacy test applied to all voters, irrespective of race and color, did not violate the 14th and 17th amendments. In *Mason v. Missouri*, 179 U.S. 328 (1900) the Court held that a State, by providing different types of voting registration for different-sized cities, did not violate the equal-protection clause of the 14th amendment. In *Guinn v. United States*, 238 U.S. 347 (1915), the Court invalidated a literacy test which State law, in effect, required to be administered only to Negroes on the ground that this was discrimination forbidden by the 15th amendment. While those cases support the proposition that a State may impose a literacy test, none of them hold that Congress may not, under the equal-protection clause and the fifth section of the 14th amendment, prevent a State from prescribing unreasonable qualifications for voting.

However, it must be kept in mind that, pursuant to section 5 of the 14th amendment, "legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the 14th amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit to take, and which, by the amendment, they are prohibited from committing or taking." *Civil Rights Cases*, 100 U.S. 3, 13 (1883).

It is well settled that consistent with the equal-protection clause a State may provide for classification so long as it has a reasonable basis and is not arbitrary. See, e.g., *Watson v. Maryland*, 218 U.S. 173 (1910); *Smith v. Cuhoon*, 283 U.S. 553, 566-567 (1931).

Nevertheless, Congress has been held to have power, pursuant to section 5 of the 14th amendment, to prescribe what classifications a State may make. *Ex Parte Virginia*, 100 U.S. 339 (1880), involved the case of a State official charged with the selection of jurors to serve in State courts, unquestionably the exercise of a power possessed by the State. He excluded negroes otherwise qualified from the jury lists. He was indicted under the act of Congress of March 1, 1875, section 4 (today 18 U.S.C., section 243) which provided that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000."

The petitioner, in his petition for a writ of habeas corpus, conceded he was properly indicted if section 4 was constitutional. The Court denied the action for the writ, and, in upholding the constitutionality of section 4 under the equal-protection clause and section 5 of the 14th amendment, in effect held that Congress may declare what qualifications imposed by the State in the exercise of an unquestioned power (to decide who shall serve as jurors in its courts) amount to an unreasonable classification. Stated differently, Congress pursuant to its power to enforce the equal-protection clause provided by section 5 of the 14th amendment may decide what a State may not do in prescribing qualifications for the exercise of a right given by State law. The Court in its opinion

cited *Strauder v. West Virginia*, 100 U.S. 303 (1880). *Ex Parte Virginia*, *supra* at 345. That case held that, under the 14th amendment's equal-protection clause, an accused in a State criminal proceeding is entitled to be tried by a jury composed of jurors selected without discrimination against such jurors because of their color, and that Congress, under the 5th section of the 14th amendment, may enforce this right of an accused by appropriate legislation. Stated differently, Congress may ordain that an accused in a State criminal proceeding may not be tried by a jury composed of jurors whose qualifications are determined by unreasonable criteria; that is, by what type of jury he may not be tried.

Both *Ex Parte Virginia*, *supra*, and *Strauder v. West Virginia*, *supra*, can be said to establish that, pursuant to section 5 of the 14th amendment, Congress, by appropriate legislation, may ordain what a State may *not* do in prescribing the conditions or qualifications for the exercise of rights which the State has undoubted power to regulate; namely, the right to be a juror in its courts and the right to trial by jury. The *Civil Right Cases*, *supra*, decided 3 years after *Ex Parte Virginia*, *supra*, do not detract from these decisions since they decided that Congress, under its power to enforce the 14th amendment, may establish corrective though not general, legislation upon the rights of the citizen. In fact, the Court in the *Civil Right Cases* conceded that the statute involved in *Ex Parte Virginia* was constitutional, and distinguished that case on the ground that the statute there was directed at *State enforced* disqualifications. 109 U.S. 3, 15-16 (1883). Thus, it could be said that Congress may ordain what qualifications a State may not require whenever an election is held under its authority.

Assuming, however, that Congress may ordain what voting qualifications a State may not prescribe, these cases imply that the classifications the Congress has the power to forbid the States to make must have no reasonable basis. Furthermore, whenever the Congress legislates, the fifth amendment's due process clause requires it to act reasonably. See *Stewart Machine Co. v. Davis*, 301 U.S. 548, 584-585 (1937). Presumably, this clause forbids the Congress to prevent the States from making reasonable classifications in determining who shall be entitled to vote.

Thus the question narrows down to whether a State's withholding of the right to vote from a person who is otherwise qualified, and who can show that he has completed the sixth primary grade in a school accredited by any State or by the District of Columbia, amounts to the making of an arbitrary and unreasonable classification? The *Lassiter* case determined only that a literacy test, fair on its face and administered in a racially nondiscriminatory fashion, is not invalid. The Court said: "The ability to read and write * * * has some relation to standards designed to promote intelligent use of the ballot * * * [and that] in our society where newspapers, periodicals, books, and other printed mater canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise." 360 U.S. 45, at 51-52.

Further, a State's policy "that a literacy test * * * [is] designed to insure an independent and intelligent exercise of the right of suffrage * * * is an allowable one measured by constitutional standards." *Id.* at 52-53 (footnote omitted).

The *Lassiter* case, however, did not decide that Congress under its powers to enforce the equal protection clause may not prevent a State from requiring a literacy test of a person otherwise qualified who had completed the sixth primary grade in a school accredited by any State or by the District of Columbia. The finding of the Congress in the exercise of those powers that such a person should not be subjected to a literacy test is not only consistent with the policy of some States that only those who are literate should be allowed to vote but will go far toward establishing the constitutionality of the congressional prohibition.

Insofar as S. 480 deals with the election of Congressmen and Senators it must be kept in mind that Congress is not limited under the 14th amendment to legislation corrective of State action but has the power under article 1, sections 1, 4, the 17th amendment, and article 1, section 8, clause 18, to secure the right to vote in Federal elections. See *United States v. Classic*, *supra* at 315-316; *Wilkey v. Sinkler*, 179 U.S. 58 (1900); *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1884); *United States v. Mosley*, 238 U.S. 383 (1915); *Hannah v. Larche*, *supra*, at 819-820. But cf. *United States v. Reese*, 92 U.S. 214, 218 (1886); *James v. Bowman*, 190 U.S. 127, 136 (1903).

However, to date the Court has decided no more than that Congress pursuant to this power can protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud whether the prohibited acts are done privately or under State auspices (whether or not lawful under State law) as long as they took place in an election, which as a practical matter, determines who is elected to the Congress. See *Ex Parte Yarbrough*, *supra*; *Wiley v. Sinkler*, *supra*; *United States v. Glasco*, *supra*; *Ex Parte Siebold*, *supra*. Thus, the fact that a congressional election may be involved has not yet been held to give the Congress additional power to prescribe voting qualifications either directly or by way of a prohibition of State action.

S. 2750 provides in essence that no person, whether or not acting under State auspices, shall deprive or attempt to deprive any other person of the right to vote in a Federal election (as defined) by, *inter alia*,

(1) applying to any person "standards or procedures more stringent than are applied to others similarly situated" and

(2) denying any person otherwise qualified by law "the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico."

To the extent that S. 2750 prohibits a person acting under State auspices from applying to any person otherwise qualified to vote in a Federal election standards or procedures more stringent than are applied to others similarly situated, there seems to be no problem of constitutionality. See *Guinn v. United States*, *supra*; *Davis v. Schnell*, 81 F. Supp. 872, 878 (S.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949); *Lasiter v. Northhampton County Bd. of Elections*, *supra* at 53-54; *United States v. Raines*, 180 F. Supp. 121 (M.D. Ga. 1960). The same conduct by a person not acting under State auspices presents a different problem. However, the Congress pursuant to its powers to maintain the integrity of Federal elections, *see supra*, undoubtedly may prevent a private person from meddling or interfering with them. Similarly, the Congress may undoubtedly prevent a private person from applying a literacy or other test to any other person whatever his qualifications.

The real problem posed by S. 2750 except for some minor variations is basically similar to that of S. 480, namely whether the Congress may prohibit persons acting under State auspices from requiring a literacy test of persons otherwise qualified to vote having completed the sixth primary grade in an accredited school. The comments made previously regarding S. 480 are equally applicable to this aspect of S. 2750, although S. 2750 is confined to Federal elections. This is because S. 480 dealt with any election held under State auspices.

The question of the constitutionality of creating a presumption that the completion of a sixth grade education is itself proof of literacy and the capacity to exercise the franchise intelligently is essentially not different from establishing that the franchise may not be denied to a person otherwise qualified who has completed the sixth primary grade in an accredited school. However, the establishment of such a presumption might create some of the very problems S. 480 and S. 2750 appear intended to remedy.

You will note that I have confined my comments to considerations of constitutionality. I have not addressed myself to the desirability of either enactment, since I feel others can draw on more expertise in matters involving statutory draftsmanship and feasible political considerations.

Please feel free to insert my views in the record. Thank you for the opportunity to express them.

Sincerely yours,

MANFRED PIECK,
Associate Professor of Law.

OMAHA, NEBR., April 3, 1962.

HON. SAM J. ERVIN, JR.
Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SIR: I received your letter of March 28, 1962, containing a copy of S. 2979 and requesting my comment on it. Please note that the views expressed in this letter do not necessarily reflect the views of the Creighton University.

Section 1 of the 14th and of the 15th amendments lays down a limitation upon governmental action. As pointed out in my previous letter, the Congress pursuant to section 5 of the 14th amendment may not establish general legislation upon the rights of citizens of the United States, but may prohibit the States from establishing or applying voting criteria which are arbitrary and unreasonable. Based on the substantial identity of the language of section 5 of the 14th amendment and section 2 of the 15th amendment, Congress would have at least the power to prohibit the States from establishing or applying voting criteria based on race, color, or previous condition of servitude. It is thus clear that the Congress has the power to prevent States from establishing or applying voting criteria which can be or are used to deny citizens the right to vote on account of race, or color. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959), as well as prevent the States from establishing voting criteria which are otherwise unreasonable and arbitrary. See *Laroché v. Hannah*, 177 F. Supp. 816, 821 (W.D. La. 1959) aff'd *Hannah v. Laroché*, 363 U.S. 420 (1960).

If the enumeration in section 2(b) and section 3 of S. 2979 which provide respectively what a State may and may not do in establishing or applying voting criteria is construed as prohibiting the States from establishing or applying voting qualifications based on race or color or on other arbitrary or unreasonable standards, it is not likely that such legislation will be held invalid. The prohibition upon the United States contained in section 2(b) will similarly not be repugnant to the due process clause of the fifth amendment.

Section 4 of S. 2979 pertains only to Federal elections. As pointed out in my previous letter, there is little doubt that the Congress has the power to protect the integrity of Federal elections against the interference by private persons or by persons acting under color of law, whether or not such interference is arbitrary. See *United States v. Classic*, 313 U.S. 299 (1941). In addition, Congress has the power to prevent those acting for and on behalf of State and Federal Governments from arbitrarily interfering, by action or nonaction, with the right of voters in Federal elections. These powers furnish what appears to be a clear basis for the validity of section 4 if enacted.

If Congress may enact sections 2-4 of S. 2979, the information-gathering provisions of section 5 find support in the power of the Congress to investigate the matter upon which it may legislate. See *Laroché v. Hannah*, *supra* at 821. However, section 5 may create the problem of voting registrars or census takers having to ask voters for information to which they are not constitutionally entitled. Another problem created by the mere presence of section 5 in S. 2979 is that it weakens somewhat the congressional findings set forth in section 1(a). A recitation that such findings are supported by the data which have been gathered by the Civil Rights Commission would be in order.

Thank you for the opportunity to express my views.

Sincerely yours,

MANFRED PIEOK,
Associate Professor.

DENVER UNIVERSITY LAW CENTER

DENVER, COLO., March 5, 1962.

HON. SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: In relation to the subcommittee hearings on the two bills dealing with literacy test requirements as conditions for voting, I am enclosing my comments on the constitutionality of the two bills. I hope these comments will be of some use to the subcommittee when it considers the proposed legislation; you have my permission to insert these comments in the record of the hearings.

In brief, my views are that S. 2750 is a constitutional exercise of the powers of Congress but that S. 480 is of doubtful constitutionality. I have purposely kept my comments brief because I feel the subcommittee is already aware of the essential problems connected with the bills and because similar problems have already been debated at great length in connection with antipoll tax legislation.

Thank you for allowing me the opportunity of expressing my views on the two bills and I would like to offer my services to the subcommittee at any time you may feel they would be of some use.

Sincerely yours,

MORTON GITELMAN,
Assistant Professor of Law.

REMARKS BY MORTON GITELMAN, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF DENVER COLLEGE OF LAW, CONCERNING THE CONSTITUTIONALITY OF S. 2750, 87TH CONGRESS, 2D SESSION AND S. 480, 87TH CONGRESS, 1ST SESSION

I. S. 2750

(A) *Constitutionality of abolishing literacy tests*

The problems attendant upon a congressional attempt to abolish literacy tests as a State imposed election qualification are compounded by the fact that the United States Supreme Court has never expressly delimited the powers of Congress to regulate elections. However, the Court has given many indications of the relative powers of the States and of Congress which may prove helpful.

Few have questioned the broad powers of the States to impose qualifications for electors in Federal as well as State elections. These powers stem from article I, section 2: " * * the electors in each State shall have the qualifications requisite for the electors of the most numerous branch of the State legislature."; the 17th amendment which uses similar language for senatorial electors; article II, section 1, clause 2 and the 12th amendment use similar language for presidential electors. In addition, the Supreme Court has often mentioned the power of the States to impose qualifications for electors. See, e.g., *Pope v. Williams* (193 U.S. 621 (1904)); *Guinn v. United States* (238 U.S. 347 (1915)).

Although the States have broad power to impose voting qualifications, this power is not absolute. Clearly, the 15th and 19th amendments prevent the States from regulating elections in such a manner as to discriminate against citizens because of race, color, or sex. Also, article I, section 4, gives Congress the power to regulate the "Times, places, and manner" of holding elections for Senators and Representatives.

Applying the above principles to the question of literacy tests, the first consideration must be the case of *Lassiter v. Northampton Election Board* (360 U.S. 45). This recent (1959) case held that a State may require a literacy test, nondiscriminatory on its face, to all prospective voters. However, in the course of his opinion for a unanimous Court, Justice Douglas stated:

"So while the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." (360 U.S. at p. 51.) [Emphasis added.]

The implication of this statement is that a State may impose a literacy test in the absence of a valid congressional act to the contrary. If S. 2750 were law at the time of the *Lassiter* case, the question the Court would have had to determine is whether the congressional exercise of power is valid. As further indication that the *Lassiter* case, by itself, does not stand in the way of S. 2750, we have two expressions by the Supreme Court that the powers of the States are limited by article I, section 4:

(1) In *Minor v. Happersett* (21 Wall. 162 (1875)), Justice Waite said:

"It is not necessary to inquire whether this power of supervision (under art. I, sec. 4) thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts." (21 Wall. at p. 171.)

(2) In *United States v. Classic* (313 U.S. 299 (1941)), the Court indicated that the power of the States was subject to article I, section 4, and the "necessary and proper" clause:

"[T]he States are authorized to legislate on the subject (voting qualifications) as provided by section 2 of article I, to the extent that Congress has not restricted State action by the exercise of its powers to regulate elections under (art. I, sec. 4) and its more general power under article I, section 8, clause 18, of the Constitution to 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers.'" (313 U.S. at p. 315.)

Therefore, since the powers of the States to impose voting qualifications are limited by the valid exercise of congressional powers, it only remains to inquire whether the power of Congress to regulate the "times, places, and manner" of holding elections for Senators and Representatives extends to abolition of literacy tests.

The question of whether the phrase "time, places, and manner" extends to voting qualifications has been debated before. See, e.g., "Hearings before a Subcommittee of the Committee on Judiciary on S. 1280, 77th Congress, 2d session (1942)," dealing with proposed antipoll tax legislation. These debates must be regarded as inconclusive, since the legislation was never enacted or tested. However, some precedent, judicial and historical exists for the proposition that voting qualifications, such as literacy tests, fall within the phrase "time, places, and manner."

In *Smiley v. Holm* (285 U.S. 355 (1932)), Chief Justice Hughes stated:

"The subject matter is the 'times, places, and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections." (285 U.S. at p. 360.)

Also see *Dummit v. O'Connell* (181 S.W. 2d 691 (Ky. 1944)), where the Court stated a voting qualification referred to the method of casting a ballot and could be abrogated by an act of Congress under article I, section 4.

James Madison spoke of article I, section 4, in the following terms: "Should the people of any State, by any means, be deprived of the right of suffrage, it was judged proper that it be remedied by the General Government." (3 Elliott, Debates on the Adoption of the Federal Constitution, 367 (1800).)

In addition to the above statements, the proposition that Congress can act generally under article I, section 4, against fraud and corruption in elections has been well settled. See, e.g., *Ex parte Yarbrough* (110 U.S. 651 (1884)); *Ex parte Stebbins* (100 U.S. 371 (1879)); *United States v. Classic* (313 U.S. 299 (1941)).

Under article I, section 4 Congress can regulate elections for Senators and Representatives, since State imposed voting qualifications relate to the "manner" of holding elections; the Supreme Court has indicated on more than one occasion that the powers of Congress under article I, section 4 are broad—broad enough to reject the view that the section refers only to the mechanics of holding elections.

Congress has the power, as demonstrated above, to abolish literacy tests in elections for Senators and Representatives. The question remains whether S. 2750 can abolish literacy tests in elections for President, Vice President, or presidential electors.

The powers of Congress in regard to presidential elections is necessarily limited by the fact that article I, section 4, applies only to congressional elections. Some Supreme Court cases sustain the view that the powers of the States are absolute in the area of presidential elections. See, e.g., *In re Green* (134 U.S. 377 (1890)); *McPherson v. Blacker* (146 U.S. 1 (1892)). However, a later case, *Burroughs v. United States* (290 U.S. 534 (1934)), stated that the power of Congress extends to protection of presidential elections from corruption. The *Burroughs* case specifically denied that congressional power over presidential elections is limited to determination of the time of choosing electors.

Another indication that Congress may regulate presidential elections is found in *Ex parte Yarbrough* (110 U.S. 651 (1884)), where the Court holds that once the States grant the right to "vote" for presidential electors (in opposition to appointment or some other scheme of selection) the right becomes a national right. Thus Congress can regulate this national right under the privileges and immunities clause and section 5 of the 14th amendment.

In conclusion, then, the portions of S. 2750 which abolish literacy tests in Federal elections are a constitutional exercise of the power of Congress.

(B) Constitutionality of creating a presumption of literacy

S. 2750 creates a presumption of law that completion of a sixth-grade education is proof of literacy. The question arises whether Congress can constitutionally create such a presumption. The question has been quite settled in favor of such legislative presumptions: "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases,

abound, and the decisions upholding them are numerous. (*Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910), quoted with approval in *Adler v. Bd. of Education*, 342 U.S. 485 (1952).)"

II. S. 480

S. 480 is similar in all major respects to S. 2750 except that it seeks to abolish literacy tests in State as well as Federal elections. This difference is enough to raise serious doubts as to the constitutionality of S. 480.

The powers of Congress to regulate State and local elections are limited to the areas encompassed by the 14th, 15th, and 19th amendments. The 19th amendment need not be considered here since it deals with female suffrage. S. 480 cannot be supported on the basis of the 15th amendment since citizens are not being denied the right to vote because of race or color. Literacy tests which are required of all prospective voters do not violate the 15th amendment; thus Congress has no power under that amendment to abolish literacy tests.

The only resting place, then, for S. 480 is the 14th amendment. The power of Congress to abolish literacy tests in State elections under this amendment is questionable. First, the right to vote in a State election is not a right peculiar to U.S. citizenship; therefore, it is not a privilege and immunity under the 14th amendment. See *Slaughter-House Cases*, 16 Wall. 36 (1873); *Twining v. New Jersey*, 211 U.S. 78 (1908). Second, literacy tests do not violate the equal-protection clause nor the due-process clause since the tests are general, applicable to all, and are a reasonable exercise of the police power of the States. See *Lusitator v. Northampton Election Bd.*, 360 U.S. 45 (1959). Although a literacy test may be, and probably is, applied in a discriminatory manner, it is valid on its face; furthermore, the victim has a remedy under existing civil rights legislation. See U.S. Rev. Stats. § 5510; 42 U.S.C. § 1983.

In conclusion, the constitutionality of S. 480 is, at best, doubtful. The problem of literacy tests is best handled through regulation of Federal elections as in S. 2750. The congressional power in respect to Federal elections is much broader; in addition, the abolition of literacy tests in Federal elections will tend to solve the entire problem because of usual State practices of providing a single registration for Federal and State elections and a single ballot for Federal and State officers.

DE PAUL UNIVERSITY LAW SCHOOL

CHICAGO, ILL., March 17, 1962.

Hon. Senator SAM J. ERVIN, Jr.,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This concerns your letter of February 9, 1962, in which you request an opinion as to the constitutionality of two bills, S. 2750 and S. 480, literacy requirements in voting at Federal elections.

The broad power of the State to prescribe voting qualifications of electors has, it is true, been upheld by several Supreme Court decisions. Congress had not legislated on the subject of literacy in voting. Therefore the Court has not in the past been called upon to answer the question of congressional power in this regard. The Court has at no time denied congressional power in this field.

In decisions upholding the right of the State to prescribe voting qualifications there is on occasion set forth an undefined residuum of power in Congress. *Pope v. Williams* (193 U.S. 021), says "the right to vote for a Member of Congress is not derived exclusively from State law." In *Minor v. Happersett* (88 U.S. 162, 171), the question was whether women by State law could be denied the right to vote, and the Court said: "It is not necessary to inquire whether the power of supervision (over national elections) thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State is supreme until Congress acts." Note the Court says "until Congress acts."

In *United States v. Classic* (313 U.S. 299), the Court said: "While in a loose sense, the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the States * * * this statement is true only in the sense that the States are authorized by the Constitution to legislate on the subject as provided by sec. 2 of art. I, to the extent that Congress has not restricted State action by the exercise of its power to regulate elections under sec. 4 and its more

general powers under art. I, sec. 8, clause 18 of the Constitution," the necessary and proper clause.

Ex Parte Yarbrough (110 U.S. 651), says: "His right to vote is based upon the Constitution and not upon State law, and Congress has the constitutional power to pass laws for the free, pure, and safe exercise of that right. It is not true that electors for Members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to vote depend exclusively on the law of the State."

Ex Parte Siebold (100 U.S. 371), recognized an extensive power in Congress to affirmatively legislate to maintain the purity of Federal elections even to the extent of proscribing conduct by State officials under State law.

S. 2750 and S. 480 do not prescribe qualifications of voters. They set limits to what otherwise might be discrimination in elector qualifications. This is a facet of regulation of elections to prevent interference with the right to vote rather than qualification of electors. Congress in these bills makes findings regarding discrimination, arbitrary action, and unreasonableness in denying the right to vote to persons who might otherwise be qualified. The Court could certainly find rational basis for these findings citing, for instance, *United States v. Raines* (362 U.S. 17), where Negro college graduates testified they had been refused permission to register to vote on grounds of illiteracy for mispronouncing or misspelling words in constitutional sections read to them by the registrar. *Yick Wo v. Hopkins* (118 U.S. 353), found that an otherwise valid law violated the Constitution because its enforcement discriminated against the Chinese. The Court has upheld congressional findings on numerous occasions, very recently in *Communist Party of America v. Subversive Activities Control Board* (367 U.S. 1). The Court might very well agree with congressional findings and hold that literacy requirements lead to widespread discrimination under the 14th and 15th amendments and that Congress under its authority to prevent discrimination and maintain the purity of Federal elections may legislate to that end.

Although Spanish speaking groups in this country are not technically a race in the sense that Negroes are, they are a race under the 15th amendment in a broad ethnic and cultural sense. The Britannica World Dictionary gives one of the definitions of race as "any class of beings having characteristics uniting them or differentiating them from others."

Under the *Meyer v. Nebraska* case (262 U.S. 300), the Court in upholding the right to use the German language in teaching said: "The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue."

The U.N. Charter has the same effect as a treaty. The Court has indicated it is the law of the land. It provides that members "should promote universal respect for and observance of human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion." The Declaration of Human Rights provides that voting privileges shall be extended to everyone "without distinction of any kind, as to race, sex, language, religion, political or other opinion, national origin, property, birth, or other status."

It is possible that in the final analysis the Court may look upon the matter of literacy requirements in voting as a political question when Congress steps in.

I believe the legislation would be held constitutional on the basis of the above. You may use this expression of views for any purpose you desire including insertion in the printed record.

The very best to you in your endeavors.

Respectfully yours,

ROBERT G. WECLEW,
Associate Professor and Teacher of Constitutional Law,
DePaul University.

DICKINSON SCHOOL OF LAW

PHILADELPHIA, PA., February 21, 1962.

Re: S. 2750 and S. 480

Hon. SAM J. ERVIN, Jr.,
Chairman of the Subcommittee on Constitutional Rights,
Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: As per your request, Dean Shafer of Dickinson School of Law has forwarded to me, as professor of constitutional law at Dickinson,

your letter of February 12 asking my opinion concerning the constitutionality of S. 2750 and S. 480.

As your letter points out, provisions in article I and the 17th amendment require that the electors for Senators and Congressmen in each State "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Similarly, article II and the 12th amendment indicate that the President and Vice President are to be elected "by electors who must be chosen in each State."

In my opinion, the language of the Constitution clearly reposes in the States the ultimate determination of the qualifications of the voters. Without constitutional amendment, I do not see how Congress can take from the States the power to determine such qualifications.

Of course, in view of the amendments following the Civil War, which guarantee Negro suffrage, and under decisions like *Grimm v. U.S.*, (238 U.S. 347), the Federal Government, both through its courts and through Congress, may, and should, act to prevent discrimination against Negroes, and, for that matter, against any other minority group. Congress may certainly forbid States from setting higher qualification standards for Negro and other minority group voters than are set for voters generally, but so long as the States meticulously avoid any semblance of discrimination, neither the Supreme Court nor Congress, in my opinion, has authority to interfere with the constitutional prerogative of the States to determine for themselves the qualification of voters. In my opinion, the proposed statutes go beyond merely preventing discrimination and cannot be justified, even as a sophisticated effort to avoid discrimination.

Finally, in answer to your inquiry concerning the constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and of capacity to vote intelligently, it is my opinion that, even if the presumption were made rebuttable, a Federal statute of that sort would still be invading the prerogative of the States. I might add that if diplomas are going to be made a prerequisite for voting, a Pandora's box of problems is going to be precipitated.

I note that S. 2750 is willing to substitute proficiency in Spanish for proficiency in English. If proficiency in Spanish is to be sufficient, why not proficiency in Hebrew, Italian, Germany, French, etc.?

I am opposed as firmly as anyone can be to discrimination against Negro and other minority group voters, but I am persuaded that the Federal courts, under existing constitutional and statutory provisions, can deal adequately with any attempts to disenfranchise Negroes or minority groups and that these proposed statutes are not only unnecessary, but would create needless problems and limitations upon the powers of the States.

Sincerely,

DONALD J. FARAGE.

PHILADELPHIA, PA., March 27, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate, Committee on the Judiciary,
Subcommittee on Constitutional Rights, Washington, D.C.

DEAR SENATOR ERVIN: Your letter of March 23, asking me to comment on S. 2979, is acknowledged.

While this bill is, in some respects, better drafted than S. 480 and S. 2750, it is my opinion that it is still subject to the same basic objections that I previously voiced concerning the other two bills.

I notice that S. 2979 attempts to regulate the qualifications of voters for both Federal and State elections and that, in effect, it deprives the States of the power to require more than a sixth grade education as a qualification for registering or voting. Despite the more sophisticated phraseology used throughout this bill, it still appears clear to me that the bill goes far beyond preventing discrimination, on account of race or color, and purports to impose even nondiscriminatory literacy requirements. Under the existing Constitution, I see no reason why, in this modern day of advanced education, a State should not have the power to require a 10th grade or even full high school education as a condition of voting, so long as such condition was uniformly applied throughout the State to all persons. I iterate that, in my opinion, the 14th and 15th amendments permit the Federal Government to regulate voters' qualifications only to the extent of proscribing discrimination; whereas this bill, in the guise of seeking to prevent dis-

crimination, goes far afield and seeks to limit the power of the States to enact even nondiscriminatory legislation, which is clearly entrusted to the States under existing constitutional provisions.

Again I iterate such a bill opens a "Pandora's box." Suppose a Negro, who finished his schooling in Texas 50 years before, seeks to vote in North Carolina. Suppose he has no certificate showing completion of a sixth grade education. How are his educational qualifications determined? Suppose no records are available from Texas, either because records were not preserved when he went to school, or because they had been lost in one way or another. Will a letter or a note from a former teacher or other hearsay evidence of qualifications be sufficient? If he presents a certificate showing that he completed sixth grade, are the State authorities necessarily to be bound by the certificate? May they question its authenticity, and, if so, are there going to be trials to test such authenticity? Even if it is conceded that he had a valid certificate showing completion of sixth grade studies, suppose that the standards of education in the State where the Negro seeks to vote are such that the achievement in the State where the schooling took place is equivalent only to that of the fourth grade in the State where the Negro seeks to vote. In the latter case, to allow this Negro to vote on what is essentially the equivalent only of a fourth grade education would be to discriminate unfairly against local citizens whose sixth grade education involved higher achievement. In short, by the standards of which State is the fact of a sixth grade education to be measured, the State where the schooling took place, or the State in which the citizen seeks to vote? This bill opens the door to these and many other troublesome questions.

Finally, I note that, in addition to limiting the power of the States to enact nondiscriminatory literacy tests, S. 2079 also attempts to restrict the power of the States to enact age and residency requirements by requiring that such requirements be "reasonable" as well as nondiscriminatory. It seems to me that the power and burden of determining what is reasonable is one which the Constitution entrusts to the States. If a State chooses to enact age and residency requirements, which are reasonable under the constitution of the State, I cannot see how Congress has the authority to superimpose a different standard of reasonableness, so long as the age and residency requirements are uniformly applied throughout the State to all persons.

In summary, it is my opinion that, whether Congress chooses to deal with residency, age, or literacy requirements, it may do so only to the extent of providing that State law must be uniformly applied within the State and its political subdivision to all persons. Beyond that, barring a constitutional amendment, the power of the States to determine for themselves what the specific nondiscriminatory qualifications should be remains exclusively a State prerogative.

With kind regards,

Sincerely,

DONALD J. FARAGE.

DUKE UNIVERSITY LAW SCHOOL

DURHAM, N.C., March 17, 1962.

HON. SAM J. ERVIN, JR.
Chairman, Subcommittee on Constitutional Rights,
Senate Committee on the Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR ERVIN: This is an answer to your letter asking for my opinion about the constitutionality of S. 480 and S. 2750. I believe that either bill, if enacted into law and challenged in the courts, would rightly be held to be consistent with the Constitution.

The two bills differ in important respects, but both would amend 42 U.S.C. 1971 to make it provide in effect that no person otherwise qualified shall be denied the right to vote because of a literacy test if he has completed the sixth primary grade in school. S. 480 applies to voting in all elections; S. 2750 does not apply to State elections in which the ballot lists no candidate for President, Vice President, presidential elector, Senator, or Representative. S. 480 relates to official action only (although, as *United States v. Raines*, (362 U.S. 17) (1960) indicates, provisions of subsection (a) of 42 U.S.C. 1971, which S. 480 would not change may extend to private action); S. 2750 would expand a provision of subsection (b) which forbids private action as well as

official action interfering with the right to vote. (Subsections (a) and (b) of 42 U.S.C. 1971 are, and thus S. 480 and S. 2750 would be, implemented by the provisions for preventive relief in subsections (c), (d), and (e), added to section 1971 by the Civil Rights Acts of 1957 and 1960.) Under S. 480, the sixth primary grade must be completed in a school "accredited by any State or by the District of Columbia"; under S. 2750 the school may be "any public school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico," and the inclusion of schools in Puerto Rico is explained by a congressional finding that "lack of proficiency in the English language provides no reasonable basis for excluding * * * from participating in the democratic process" citizens of a State educated "in a part of the United States in which the Spanish language is commonly used."

Discussing S. 480 first, I shall refer to and quote from opinions in Supreme Court decisions which explicitly recognize that the 14th and 15th amendments grant to Congress powers which I believe the courts would rightly hold enable Congress to make applicable to all elections a requirement that the States treat completion of the sixth grade in school as satisfying a literacy test. I shall state why I believe the courts would rightly uphold such a requirement even in the case, covered by S. 2750, of a citizen illiterate in English who has completed the sixth grade in a Puerto Rican school in which Spanish was the medium of instruction. I shall then discuss S. 2750 and the constitutionality of subsection (b) of 42 U.S.C. 1971 as it would read if S. 2750 were enacted.

Although S. 2750 is entitled "A bill to protect the right to vote in Federal elections * * *," its provisions (including its definition of "Federal election") actually would protect the right to vote, at an election in which a candidate for presidential elector or Senator or Representative is listed on the ballot, for a candidate for any office whatsoever (including any State office). Because I believe Congress will rightly be held by the courts to have power under the 14th and 15th amendments to make the "sixth-grade provision" (and its Spanish-language variant) applicable to all elections, I deem it unnecessary to discuss whether Congress could validly enact such provisions under the power conferred upon it by section 4 of article I to "make or alter" State regulations of the "manner of holding elections for Senators and Representatives."

Past decisions of the Supreme Court have not, I believe, explicitly recognized that the Constitution (1) grants to Congress powers which enable it to enact 42 U.S.C. 1971(b)'s present prohibition against private action, not under color of law, insofar as that prohibition applies to interference with the right to vote for a presidential elector, or (2) grants to Congress powers which enable it (i) to extend that prohibition, as S. 2750 would, to the right to vote for a candidate for any State office at a State election in which a presidential elector or Senator or Representative may be voted for, or (ii) to enact, as S. 2750 would, other prohibitions against purely private action which would be a "deprivation of the right to vote" (if purely private action would be such a deprivation, as it might be under S. 2750's definition of that term). Nevertheless I believe, for reasons I shall state, that principles established by past Supreme Court decisions about different but analogous questions would rightly lead the courts to uphold the validity of all applications of 42 U.S.C. 1971(b) as it would read if S. 2750 were enacted.

S. 480 (AND S. 2750'S SPANISH-LANGUAGE VARIANT OF THE "SIXTH-GRADE PROVISION")

1. Summary of the bill's provisions

Section 2 of S. 480 would amend subsection (a) of 42 U.S.C. 1971. That subsection now provides that all citizens otherwise qualified to vote at any election shall be entitled and allowed to vote "without distinction of race [or] color." S. 480 would add: "and without subjection to any arbitrary or unreasonable test, standard, or practice with respect to literacy," defined as "any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia."

Subsections (a) through (d) of section 1 of S. 480 set forth congressional findings. In (a), Congress finds "that the right to vote is fundamental to free, democratic government," and that it is "the responsibility of all Federal Government to secure and protect this right against all unreasonable and arbitrary

restrictions." The essence of (b) is a finding "that tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color." The essence of (c) is a finding "that a literate electorate can be assured by affording the right to vote to any otherwise qualified person who has completed six grades of education; and that any test of literacy that denies the right to vote to any [such] person * * * is arbitrary and unreasonable." In (d) Congress finds and declares the enactment of S. 480 "necessary to make effective the guarantees of the Constitution, particularly those contained in the 14th and 15th amendments, by eliminating or preventing arbitrary and unreasonable restrictions on the franchise which deny "the right to vote to persons with at least six grades of education and which exist * * * to effectuate denials of the right to vote on account of race or color."

2. Constitutional limitations on the States' reserved power to prescribe qualifications for voters in State elections

The Constitution explicitly recognizes, in section 2 of article I and in the 17th amendment, that the States have power to "prescribe the qualifications requisite for electors of the most numerous branch of the State legislature." These constitutional provisions implicitly recognize that a much broader power was not given up by the States when the Constitution was adopted, the power to prescribe the qualifications requisite for electors in all State elections. But as the 10th amendment emphasizes, under the supremacy clause of article VI: (1) all powers reserved to the States are subject to the prohibitions imposed by the Constitution on the States and (2) State laws enacted under a reserved power are invalid to the extent that they conflict either (a) with one of those prohibitions, or (b) with an act of Congress passed in the exercise of a power delegated to Congress by the Constitution.

The unanimous opinion of the Court in *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959), in holding that the North Carolina statute requiring a literacy test was not invalid on its face (360 U.S. at 53f.), stressed these constitutional limitations on the States' reserved power to prescribe the qualifications requisite for electors in State elections:

"* * * the right of suffrage * * * is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315. [360 U.S. at 51.]

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote an intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex * * *. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards. [360 U.S. at 51-53.]

"Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the 15th amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face * * * *Davis v. Schnell*, 81 F. Supp. 872, affirmed 336 U.S. 933. The present requirement * * * seems to us to be a fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot." [360 U.S. at 53-54.]

The Court thus clearly recognized in its unanimous opinion in the *Lassiter* case that State literacy requirements are constitutionally invalid (1) if they "contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed," (2) if they are either "discriminatory" as written, or constitute "a calculated scheme" to achieve discrimination, or are "employed to perpetuate * * * discrimination," and therefore violate the 15th amendment or the equal protection clause of the 14th amendment, or (3) if they have no "relation to standards designed to promote an intelligent use of the ballot" or, the opinion implies, as the Court expressly stated in a unanimous 1954 opinion, no relation to standards designed to promote some other "proper governmental objective," and therefore constitute "an arbitrary deprivation of * * * liberty in violation of the due process clause." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

3. *The power of Congress to impose, pursuant to the 14th and 15th amendments, restrictions upon the States' reserved power to prescribe qualifications for voters in State elections. Ex parte Virginia and the Civil Rights cases*

Congress is given power by section 5 of the 14th amendment and by section 2 of the 15th amendment to enforce the provisions of those amendments by "appropriate legislation." The Supreme Court has held that these grants of power are to be construed as broadly as the Constitution's other grants of power to Congress have been construed since *McCulloch v. Maryland*, 4 Wheat. 316 (1819); that it is not the courts alone that are empowered to determine what rights are protected against State action by the 14th and 15 amendments; and that these grants of power authorize Congress to insure by "legislation that is appropriate, that is, adapted to carry out the objects the amendments have in view" that rights thus specified by Congress as rights secured by the amendments shall be accorded recognition by the States. See *Ex parte Virginia*, 10 U.S. 339, 345f. (1880), where the Court said (with the emphasis indicated):

"All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the Government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

It was an act of Congress, not a judicial decision, that first determined that the 14th amendment conferred upon Negroes the right upheld in *Ex parte Virginia*. By section 4 of the Civil Rights Act of 1875, Congress had provided that "no citizen * * * shall be disqualified for service as grand or petit juror in any court * * * of any State, on account of race, color, or previous condition of servitude," and had made it a criminal offense for a person charged with selecting jurors to "exclude or fail to summon any citizen for the cause aforesaid." *Ex parte Virginia* thus held that the power granted to Congress by the 14th and 15th amendments included not merely power to provide statutory sanctions designed to make effective rights determined by the judiciary to exist because of those amendments, but also power to specify and define by "appropriate legislation" what rights the amendments protected and to provide sanctions for those legislatively determined rights.

In the *Civil Rights Cases*, 109 U.S. 3 (1883), the opinion of the Court again considered the power of Congress to enforce the 14th amendment. The rights and privileges that amendment guarantees, the Court said, "* * * are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon supposed State laws or State proceedings, and be directed to the correction of their operation and effect * * *." [109 U.S. at 11.]

"* * * Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and the wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment." [109 U.S. at 13.]

The reference in the Court's unanimous opinion in *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51 (1959) to "any restriction that Congress, acting pursuant to its constitutional powers, has imposed" on the prescription by States of standards limiting the right of suffrage is shown by these quotations from the opinions of the Supreme Court in *Ex parte Virginia* and in the *Civil Rights Cases* to be a recognition of a congressional power to enact legislation "directed to the correction of [the] operation and effect" of "supposed State laws or State proceedings" "adverse to the rights of the citizen secured by the [14th or 15th] amendment" (*Civil Rights Cases*, quotation above). These "rights of the citizen" under the two amendments include not only rights already held by the judiciary to be secured by those amendments, but also other rights which Con-

gress has specified in "legislation [which] is appropriate, that is, adapted to carry out the objects the amendments have in view, * * * [which] tends * * * to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion * * *." (*Ex parte Virginia*, quotation above).

4. *The courts would rightly hold that the "sixth-grade provision" of S. 480 is "corrective legislation" which is "adapted to carry out the objects the [14th and 15th] amendments have in view" and is therefore valid.*

The congressional findings set forth in section 1 of S. 480 summarized in "1" above, relate to "legislative facts," not to "adjudicative facts." *Cf. Garner v. Louisiana*, 368 U.S. 157 (1961). The courts, in deciding upon the validity of section 2 of S. 480, would take judicial notice of these facts even in the absence of these congressional findings. They are well-known facts. See the Reports of the Civil Rights Commission. As Mr. Justice Harlan said in his concurring opinion in *Garner*, 368 U.S. at 195: "* * * this Court has many times taken judicial notice of well-known economic and social facts * * *," citing, *inter alia*, *West Coast Hotel Co. v. Parrish*, 300, U.S. 379, 398-400 (1937). See, in general, Karst, *Legislative Facts in Constitutional Litigation*, 1960, *The Supreme Court Review* 75.

So obvious and so cogent are the arguments these facts supply in support of the proposition that the "sixth grade provision" of S. 480 is "corrective legislation" which is "adapted to carry out the objects of" the 15th amendment and of the equal protection clause of the 14th amendment that it seems wholly unnecessary to spell them out or argue their cogency. The Supreme Court has invalidated very few acts of Congress since 1938. It has demonstrated unmistakably in the white-primary cases, in the jury-discrimination cases, and in other cases involving Negroes that "calculated schemes" to achieve discrimination and State statutes "employed to perpetuate * * * discrimination," *Lassiter v. Northampton Election Board*, 360 U.S. at 53-54 (1959), call for corrective action by the courts. It is unthinkable that the Court would hold that the "sixth grade provision" does not result from an "allowable judgment" by Congress that such a provision is valid "corrective legislation" authorized by the amendments.

5. *S. 2750's extension of the "sixth grade provision" to citizens whose medium of instruction in Puerto Rican schools was the Spanish language, though they are illiterate in English, would rightly be held valid for similar reasons.*

The second part of this statement is devoted to S. 2750; this first part has until now been confined to S. 480. The Spanish language school variant of the "sixth grade provision," contained in S. 2750, however, raises questions so similar to those raised by S. 480's "sixth grade provision" that its validity will be considered here. Relevant congressional findings, set forth in section 1 of S. 2750, are summarized under the first subheading in "II" below.

The decisive question is not the wisdom or desirability, as a legislative question, of this provision of S. 2750. Arguments can be made that pressures to make all citizens English speaking are desirable because they promote "assimilation." But the holding in *Meyer v. Nebraska*, 262 U.S. 390 (1923), warns against deeming such arguments so cogent that they will induce courts to hold that this provision did not result from an allowable judgment by Congress. With reason, Congress may decide (even if the courts would not, in the absence of an act of Congress) that justice to Spanish-speaking citizens of the several States who were educated in Puerto Rico requires that they not be deprived of the right to vote by being classed with illiterates because they can speak and write little or no English. If Congress does enact S. 2750, I believe that the Supreme Court would rightly hold this provision to be permissible "corrective legislation" securing a right which Congress by an allowable judgment has specified as one conferred by the equal protection clause. The Court might well base such a holding on a different ground, that a congressional determination "correcting" State disqualification of citizens literate only in Spanish because they were educated in Puerto Rico is an allowable judgment that such a disqualification has no "relation to standards designed to promote an intelligent use of the ballot," *Lassiter v. Northampton Election Board*, 360 U.S., 45, 51 (1959), and no relation to any standard designed to promote some other "proper governmental objective," and therefore constitutes "an arbitrary deprivation of * * * liberty in violation of the due process clause." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923).

II. S. 2750

1. Summary of the bill's provisions

Section 2 of S. 2750 would amend subsection (b) of 42 U.S.C. 1971. That subsection now provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate."

S. 2750 would strike from this provision all that follows the words "vote as he may choose," and substitute therefor (1) the words "in any Federal election, or subject or attempt to subject any other person to the deprivation of the right to vote in any Federal election"; (2) a definition of "Federal election" as "any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for" any of the offices listed in the present subsection (b) of 42 U.S.C. 1971; and (3) the following:

"Deprivation of the right to vote" shall include, but shall not be limited to (1) the application to any person of standards or procedures more stringent than are applied to others similarly situated and (2) the denial to any person otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico."

Analysis of the language quoted immediately before the indented quotation reveals that S. 2750 would not change subsection (b) of 42 U.S.C. 1971 merely by adding to it a prohibition against any person's subjecting or attempting to subject ("whether * * * under color of law or otherwise") "any other person to the deprivation of the right to vote in a Federal election." By its broad definition of "Federal election" and its changes in subsection (b)'s present wording, S. 2750 would extend not only this new prohibition, but also the subsection's present prohibition against intimidation, etc., to the right to vote for a candidate *for any State office* at any State election, "general, special or primary," in which a presidential elector or a Senator or a Representative may be voted for. The subsection's present prohibition is limited to voting for a candidate for one of the offices it lists, unless (as seems unlikely) the present language is, with excessive literalness, to be read "vote as he may choose * * * at any general * * * election * * *" rather than as "vote as he may choose * * * for any candidate * * *" (thus raising constitutional questions not raised by the latter reading).

Subsections (a) through (f) of section 1 of S. 2750 set forth congressional findings. In (a) Congress finds "that it is essential to our form of government that all qualified citizens have the opportunity to participate in the choice of elected officials." In (b) Congress finds: "that the right to vote in Federal elections should be maintained free from discrimination and other corrupt influence." In (c) Congress finds "that many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color" and "that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote." In (d) Congress finds "that education in the United States is such that persons who have completed six primary grades in a public school or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy or lack of sufficient education or intelligence to exercise the prerogatives of citizenship." In (e) Congress finds that "large numbers of * * * citizens of the several States are deprived of the right to vote by virtue of their birth and education in a part of the United States in which the Spanish language is commonly used"; that these citizens have "available through Spanish-language news sources" "such information as is necessary for the intelligent exercise of the franchise" and "are well qualified to exercise the franchise"; and "that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process." In (f) Con-

gress finds that "Under article I, section 4 of the Constitution; section 5 of the 14th amendment and section 2 of the 15th amendment; and its power to protect the integrity of the Federal electoral process, Congress has the duty to provide against the abuses which presently exist."

Section 3 of S. 2750 is a standard severability provision.

2. The validity of the Spanish-language variant of the "sixth grade" provision

My conclusion, that the Spanish-language variant of the "sixth grade provision" would rightly be held by the courts to be a valid exercise of powers granted to Congress by the 14th and 15th amendments, is set forth under subheading "5" in "I" above. The reasons for this conclusion are set forth in "I" under subheadings "2" through "5."

It is not a ground of invalidity that S. 2750 makes its "sixth-grade provision" applicable, not (as Congress could constitutionally make it applicable) to all elections, but only to elections at which a candidate for presidential elector or Senator or Congressman is to be voted for. The United States is directly involved in these latter elections. Surely, therefore, Congress may refrain from making applicable to other State elections restrictions which it imposes (pursuant to its powers under the 14th and 15th amendments) on these State elections. That Congress has thus limited the applicability of the restrictions it imposes does not mean that their validity cannot be supported on a congressional power that extends to all elections; does not mean, e.g., that their validity can be supported only on article I, section 4. It is, therefore, wholly unnecessary to consider, in this connection, the scope of the power granted to Congress by article I, section 4, to "make or alter" State regulations of the "manner of holding elections for Senators and Representatives."

3. The prohibitions which subsection (b) of 42 U.S.C. 1971, as amended by S. 2750, would impose upon private conduct not engaged in under color of law.

As amended by section 2 of S. 2750, subsection (b) of 42 U.S.C. 1971 would provide (with some rearrangement of its provisions and with "Federal election" and with "deprivation of the right to vote" replaced by S. 2750's definitions of those terms) that:

"No person, whether acting under color of law or otherwise, shall—

[1] intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such person to vote or vote as he may choose in any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions [emphasis added because of later references to "such an election"] or shall, in such an election

[2] subject or attempt to subject any other person to "the application to any person [sic] of standards more stringent than are applied to others similarly situated * * *" or shall, in such an election

[3] subject or attempt to subject any other person to the denial to any person [sic] otherwise qualified by law of the right to vote on account of his performance in any examination, whether for literacy or otherwise, if such other person has not been adjudged incompetent and has completed the sixth primary grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico or shall in such an election

[4] subject or attempt to subject any other person to the deprivation of the right to vote [in a way not specified by "(2)" and "(3)"]."

The first and fourth of these prohibitions may be applicable to acts of private persons not done "under color of law." I shall assume for present purposes that there may be some such acts to which the second and third prohibitions would apply, although it is difficult to imagine any such acts.

(a) Congress obviously has power, under article I, section 8, clause 17 and article IV, section 3, paragraph 2 to enact such prohibitions against acts done "under color of law or otherwise" with respect to voting in all elections for any office whatsoever held in the District of Columbia, the Commonwealth of Puerto Rico, or in territories or possessions.

(b) The grants of power to Congress to enforce the provisions of the 14th and 15th amendments would validate applications of the four prohibitions to acts done under color of law, but of course would not validate applications of them to acts not done under color of law.

(c) Because the right to vote for Representatives is conferred by article I, section 2, and the right to vote for Senators is conferred by the 17th amendment, upon those qualified as "electors for the most numerous branch of the State legislature," those rights to vote, "unlike those guaranteed by the 14th and 15th amendments, [are] secured against the action of individuals as well as of States." (*United States v. Classic*, 313 U.S. 299 315 (1941).) For this reason (not because of the grant of power to Congress made by art. I, sec. 4) all four prohibitions could validly be applied to acts done "under color of law or otherwise," which related to voting in a State election for a Representative or a Senator.

(d) The Constitution does not provide for popular election of presidential electors. The relevant provision is article II, section 1, paragraph 2: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors * * *." Thus the right to vote for presidential electors, conferred by all States upon qualified voters by State laws, is not a "Federal right" as is the right to vote for Representatives and Senators. Therefore the principle held applicable in *United States v. Classic*, *supra*, to the right to vote for representatives is not applicable to the right to vote for presidential electors.

It is thus apparent that past decisions of the Supreme Court afford authority directly in point for holding that the four prohibitions subsection (b) of 42 U.S.C. 1971 would impose if it were amended by S. 2750 are constitutionally valid only in the following applications to conduct not under color of law: (a) voting for any office whatsoever in all elections in the District of Columbia, the Commonwealth of Puerto Rico, or in territories or possessions; and (b) voting for a Representative or for a Senator in a State election.

Despite this, I believe that if S. 2750 were enacted, the four prohibitions subsection (b) of 42 U.S.C. 1971 as thus amended would impose would rightly be held by the courts to be valid in all their possible applications: (1) When State legislatures choose to provide by law (as they all have) for choice of presidential electors by qualified voters, an electoral process is created which substantially and directly affects the Federal Government. The interest of the Federal Government in that electoral process extends to the protection of the individual voter against interference with his right to vote as he chooses, and against deprivation of his right to vote, by acts of individuals not done under color of law. An implied power of Congress to afford that protection can properly, and I believe would rightly, be found in the necessary and proper clause of article I, section 8, coupled with the implied power of Congress aptly termed in section 1 (f) of S. 2750 "power to protect the integrity of the Federal electoral process." See *Burroughs v. United States*, 290 U.S. 534 (1934), in which the Court sustained the application of the Corrupt Practices Act to conduct related to Presidential elections which was not engaged in under color of law.

(2) In *Railroad Commission of Wisconsin v. C. B. & Q. R.R. Co.*, 257 U.S. 563, 588 (1922), Mr. Chief Justice Taft, writing for a unanimous Court, said with respect to orders of the Interstate Commerce Commission that raised intrastate railroad rates to the level of the interstate rate structure:

"Effective control of one must embrace some control of the other, in view of the blending of both in actual operation. * * * while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority * * *."

This principle, I believe, would rightly be held applicable by the courts to the four prohibitions in question. When, at a single election, a voter has a right to vote for a candidate for Federal office, which right Congress has power to protect against interference by private action not under color of law, I believe that the courts would rightly hold that Congress can afford like protection to the voter's right to vote in the same election for a candidate for any office whatsoever, including any State office. That holding is called for by the penumbra (or "Herodian-enforcement") doctrine of *Purity Extract Co. v. Lynch* (226 U.S. 192, 201 (1912)); see also *Ruppert v. Caffery* (251 U.S. 264 (1920)).

III. PRESUMPTION

Your letter asks my opinion about "the constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently." I believe that Congress has power to create such a presumption because I believe, for reasons I have set fourth in (I) above, that Congress can validly go further and enact the "sixth-grade provisions" proposed in S. 480 and S. 2750. I do not believe the constitutional questions raised by those provisions and the questions raised by a provision in an act of Congress creating such a presumption differ in any significant way.

Very truly yours,

DOUGLAS B. MAGGS.

DUQUESNE UNIVERSITY SCHOOL OF LAW

PITTSBURGH, PA., April 3, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Senate Subcommittee on Constitutional Rights,
U.S. Senate Office Building, Washington, D.C.

DEAR SENATOR: Your letter to Dean T. F. Quinn, Duquesne University School of Law, in regard to S. 2750 and S. 480 relating to literacy requirements as conditions for voting were referred to me for consideration.

The issues these bills present are not capable of a simple solution, when one considers the constitutionality and desirability of these measures. While the bills may be highly desirable, the constitutionality issue presents an entirely different problem.

Directing my attention to the constitutional issues which must be considered, I would like to make the following observations. Among the constitutional provisions, article I, section 4, article II, section 1, section 2 of the 14th amendment, section 1 of the 15th amendment, the 17th and 19th amendments are directly relevant to these bills.

Article I, section 4, lays down the rule that: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof: but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Article II, section 1 and the 12th amendment declare that: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress."

Section 2 of the 14th amendment provides that: "* * * But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such State."

Section 1 of the 15th amendment states that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The 17th amendment requires that: "* * * The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The 19th amendment indicates that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627 (1875), raised the issues "whether, since the adoption of the 14th amendment, a woman who is a citizen of the United States and the State of Missouri, is a voter in that State, notwithstanding the provision of the Constitution and laws of the State, which confine the right of suffrage to men, and whether suffrage is one of the necessary privileges of a citizen of the United States," the abridgment of which is prohibited to the States. The U.S. Supreme Court said, "The Constitution of the United States does not confer the right of suffrage upon anyone, and that the

constitutions and laws of the several States which commit the important trust to men alone are not necessarily void." Obviously, this decision led to the passage of the 19th amendment, granting suffrage to the women because of the franchise control assume to exist in the State legislatures.

Gunn and Beal v. U.S., 238 U.S. 347 (1915), striking down the so-called grandfather clause in the constitution of Oklahoma of 1910, was careful to note, "No time need be spent on the question of the validity of the literacy test considered alone since, as we have seen, its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and, indeed, its validity is admitted."

Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 3 L. Ed. 2d 1072, 79 S. Ct. 985 (1959), held that the North Carolina literacy test applicable to all voters irrespective of race or color was constitutional under the 14th, 15th, and 17th amendments to the Federal Constitution. The Court pointed out that "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. We do not suggest that any standards which a State desires to adopt may be required of voters. But, there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347, 33 L. Ed. 637, 641-642, 10 S. Ct. 200), are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot."

These decisions and the provisions in the U.S. Constitution which speak of the "right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the State." Subject to the constitutional limitations and restrictions as set forth, the exclusive control of the voting franchise lies with the States. On the other hand, if abuses in the administration of a State literacy test, fair on its face, take place, the Congress may pass corrective legislation to enjoin such prohibitive State action as they have done pursuant to 42 U.S. Code 1971, implementing section 2 of the 15th amendment which provides: "The Congress shall have power to enforce this article by appropriate legislation." Corrective legislation is not synonymous with enabling acts beyond the scope of congressional power. For these reasons, S. 2750 and S. 480 are unconstitutional, as written.

Undoubtedly, Congress has the power to protect the integrity of the Federal electoral process as far as the Members of the Senate, House of Representatives, Delegates and Commissioners from the territories or possessions are concerned, by virtue of the aforementioned article I, section 4, and the property and territorial power of article IV, section 3. Thus, the provisions of the bills before the subcommittee cannot be reconciled with the holdings of the decisions and with the applicable provisions of the Constitution, in my opinion.

On the related issue creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently in the above qualified and designated area of protecting the Federal electoral process, it would appear to be constitutional if the subcommittee's findings of fact so indicate. This is basically a policy determination, and there must be supportable grounds in designating the sixth grade educational level as a proper cutoff point. Wide latitude is given to the legislature in this field as exists in the tax-exemption and social security areas.

With the hope that I have been of some assistance to you and your subcommittee in your study of this delicate and complex problem, I remain,

Sincerely yours,

WALTER A. RAFALKO, *Professor of Law.*

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

WASHINGTON, D. C., April 4, 1962.

Hon. SAM J. ERVIN, Jr.,
United States Senate, Washington, D.C.

DEAR SENATOR: Dean Nutting of our national law center has referred to me your letter addressed to law school professors of constitutional law requesting an opinion on the constitutionality and desirability of S. 2750 and S. 480 relating to literacy requirements for voting. Both of these bills derive from recommendation II in the voting report of the Commission on Civil Rights.

I am pleased to note that your request encompasses desirability as well as constitutionality. Too often we tend to approach important public policy issues as presenting solely questions of constitutional power, rather than as raising a question of democratic choice among policy alternatives.

I

The desirability of eliminating discriminatory administration of literacy tests, as a device for restricting voting by otherwise qualified Negroes (or other minorities), cannot be questioned. Some of the proponents of S. 2750 and S. 480 seem to forget that requiring functional literacy, i.e., some minimal ability to participate knowledgeably in the complex process of democratic government, likewise cannot be questioned. I feel that both of these bills, and the Commission on Civil Rights recommendation on which they are based, focus on the first consideration to the exclusion of the second. In effect they call for "tossing the baby out with the bath."

The administration bill (S. 2750) is particularly unfortunate in its repeal of the common requirement that a voter not only be literate but literate in English. There may be sound reasons for a bilingual policy in Puerto Rico. Engrafting such a policy into the political fabric of New York State, by Federal statute, would appear to some to carry overtones of partisan politics.

Further, these bills rest on the assumption that there is a close correlation between functional literacy and school attendance. Under the "chronological promotion" system prevailing in many "progressive" school systems, whereby promotion is based on age and a policy of keeping children with their friends, even high school graduation may not indicate functional literacy. Even more relevant is the fact that there is a strong movement among elementary school administrators to abandon customary standards and substitute the ungraded school. (For a brief report, see Fred Hechinger's column in the New York Times, Mar. 25, 1962, p. E7, col. 1.) In the public school in Montgomery County, Md., which one of my daughters attends, the first three grades have been abolished already. The fourth, fifth, and sixth "grades" may soon follow.

In the light of these developments the sixth grade proviso of the bills before the subcommittee would link voting eligibility to a standard either nonexistent or indefinite. Further, is it not anomalous to espouse a sixth grade literacy ceiling for voting in S. 2750 at the same time that the administration, as reported in the Washington Post (Feb. 15, 1962, p. 11) is proposing a program to the House Education Subcommittee to make seventh grade the basic minimum educational level in the United States? It would seem that what is needed is more encouragement, rather than less, for States to experiment with literacy and knowledge qualifications for the voting franchise.

A special vice of these bills, and one not stressed nearly enough in most current comment on them, is that they would put all States under a "sixth grade" ceiling of literacy in order to solve a problem of wrongful administration of valid tests which is occurring in only a handful of States. The Civil Rights Commission's own voting report states that in 1961 "the problem of denials of the right to vote because of race appears to occur in only eight Southern States—Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee" and finds that "in Florida, North Carolina, and Tennessee, it is limited to only a few isolated counties" (Commission report, vol. 1, p. 22.) In the five hard-core States, discriminatory administration of literacy requirements was indicated to be only one of several restrictive devices. In the light of this evidence on the dimensions and nature of the problem, the Commission's own recommendation and these bills based on it are rather extreme. As recently as 8 years ago, Justice Douglas, writing for a unanimous Court which upheld the constitutionality of North Carolina's literacy requirement, said: " * * * in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise." (*Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).)

A more appropriate means for achieving the important end sought by these bills, and by the Commission on Civil Rights, is already provided in the discriminatory "pattern or practice" provision of the 1960 Civil Rights Act, augmenting the Attorney General's powers as authorized in the landmark 1957 Civil Rights Act. Under this legislation, a finding of a discriminatory pattern or practice regarding voting, in a suit brought by one Negro citizen, creates a presumption

which other Negroes can avail themselves of without need for further evidence other than mere proof of denial of registration. This "pattern or practice" clause has not been fully tested, but its potential force is novel and far reaching. Rather than put the whole country in a literacy straitjacket, the administration should consider giving the Civil Rights Division of the Department of Justice the field staff and encouragement needed for effective implementation of this act. A Department of Justice crash program in selected areas in 5 States would largely achieve the goal of ending discriminatory administration of valid literacy tests, would avoid putting the whole country in a literacy straitjacket, and would leave intact the constitutional position of the States in fixing voting qualifications.

II

You also inquire about the constitutionality of S. 2750 and S. 480. Kathryn Werdegarr, a student in my constitutional law seminar this semester, has just completed a lengthy and most helpful analysis on the constitutional arguments. This material will be published this spring in the *George Washington Law Review*. I have arranged to have a prepublication copy prepared for use of your subcommittee. It will be sent to you shortly.

I have doubts concerning the constitutionality of either recommendation I or recommendation II of the Commission on Civil Rights, and concerning the constitutionality of S. 2750 and S. 480. Congressional power in regard to State elections must be derived primarily from the 14th and 15th amendments. To utilize these amendments as a basis for congressional regulation of literacy qualifications relating to State elections, the following considerations would be relevant: (1) whether maladministration of concededly valid literacy qualifications is general and widespread, (2) whether such maladministration is unrestrainable by ordinary means and hence constitutes the actual standard which the States are using, (3) whether the situation thus requires a general corrective Federal statute, and (4) whether a nationwide sixth grade literacy ceiling is "appropriate" legislation for correction of a voting-law administration problem which is confined to 5 Southern States and a few isolated counties in three additional Southern States. Such data as is available serves more to question than to support these considerations.

I also have some reservations, although less serious ones, concerning the constitutionality of a bill, like S. 2750, which is confined to Federal elections and thus seeks to derive support largely from congressional power over Federal elections as provided primarily in article I of the Constitution and the 17th amendment. (Use of the 15th amendment would be subject to the objections already listed.) Conceding that voting qualifications are not a "manner" of election under article I, section 4, support for some congressional power could still be found in article I, section 2 (and the 17th amendment), as amplified by the implied powers doctrine. Congress does have power to safeguard the purity and effectiveness of Federal elections as part of a general power of self-preservation. This principle has been used successfully to support Federal authority to safeguard access to the Federal ballot box and to protect Federal voters against physical violence. (*U.S. v. Cruikshank*, 92 U.S. 542 (1875).) This principle also will support vigorous Federal action against actual maladministration of valid law, which causes disenfranchisement. The principle may be overstretched, however, when it is appealed to in support of Federal action aimed not at the maladministration, per se, but at qualifications which are reasonable and proper on their face and positively helpful to democracy when properly administered.

For the reasons outlined above, I feel that enactment of S. 2750 and S. 480 would be rather like using a rifle to rid a dog of fleas. More than the fleas may be disturbed.

Sincerely yours,

ROBERT G. DIXON, JR.,
Professor of Law.

WASHINGTON, D.C., April 16, 1962.

HON. SAM J. ERVIN, JR.
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: My comments submitted earlier on S. 2750 and S. 480 also cover parts of S. 2979 on which you now request comment. For the detailed reasons stated in my letter of April 4, I feel that section 2 of S. 2979, which seeks to enact recommendation I of the Civil Rights Commission in regard to

voting qualifications, is undesirable, and very likely unconstitutional as well. Section 3 of the bill in regard to literacy tests is already covered in my previous comments on the parallel provisions of S. 2750 and S. 480.

Section 4 of the bill seems to clarify existing legislation. However, if it seeks to reach wholly private action in regard to State elections, it reaches beyond the present constitutional power of the Federal Government.

Section 5 is the most meritorious provision in any of the three bills. Detailed census data of this type would make it easier for the Civil Rights Division of the Department of Justice to build, and win, the "pattern or practice" suits authorized under the 1960 Civil Rights Act. The poll tax and literacy test measures are really shadowboxing to build a paper record. The way to become serious about Negro nonvoting in the South is to provide the Civil Rights Division of the Department of Justice with the encouragement and enlarged staff it needs to implement effectively the "pattern or practice" of discrimination provision of the Civil Rights Act of 1960. Neither repeal of poll taxes nor modification of literacy and education requirements will get Negro voters registered. Such "pattern or practice" suits will result in actual registrations, as the record of the Civil Rights Division of the Department of Justice to date indicates.

Sincerely yours,

ROBERT G. DIXON Jr., *Professor of Law.*

(Following is the article by Kathryn Werdegarr, submitted by Professor Dixon:)

THE CONSTITUTIONALITY OF FEDERAL LEGISLATION TO ABOLISH LITERACY TESTS:
CIVIL RIGHTS COMMISSION'S 1961 REPORT ON VOTING

I. INTRODUCTION

In its 1961 Report on Voting, the United States Commission on Civil Rights notes that current efforts to disfranchise the Negro take three principal forms: discriminatory application of legal qualifications for voters; arbitrary and discriminatory procedures for the registration of voters; and threats of retaliation or economic reprisals.¹ Recommendations I and II of the Commission's Report on Voting are specifically designed to combat the first of these—discriminatory application of voter qualifications, particularly the various forms of the literacy test.

There is no doubt that the imposition of nondiscriminatory literacy tests is a valid exercise of the states' power to prescribe voter qualifications.² The objection to these tests is that they are particularly susceptible to discriminatory application and are in fact used by several Southern states to disfranchise the Negro.³ The discriminatory application of literacy tests is clearly unconstitutional.⁴ However, to be entitled to judicial relief, a complainant must show not only that the tests are susceptible to discriminatory application, but that in fact they have been discriminatorily applied to him.⁵ The frequently broad

¹ U.S. Commission on Civil Rights Report on Voting, pt. III, finding No. 1, at 135 (1961) (hereinafter cited as 1961 Report on Voting). The use of gerrymander and malapportionment to dilute the Negro vote raises separate constitutional issues, and is not within the scope of this note. For a discussion of the problem and its possible remedies, see Lewis, "Legislative Apportionment and the Federal Courts," 71 Harvard Law Review 1057 (1958). See also 1961 Report on Voting at 113-142. The opinion of the Supreme Court in *Baker v. Carr*, 30 U.S.L. Week 4203 (U.S. Mar. 26, 1962) should have a substantial impact on the approach to this problem.

² *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Gunn v. United States*, 238 U.S. 347 (1914) (dictum); *Williams v. Mississippi*, 170 U.S. 213 (1897).
³ 1961 Report on Voting, pt. III, finding No. 9, at 137. See generally, 1961 Report on Voting at 21-71.

⁴ See, e.g., *Lassiter v. Northampton County Bd. of Elections*, *supra* note 2 (dictum); *Norris v. Alabama*, 294 U.S. 587 (1935); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Byrd v. Brice*, 104 F. Supp. 442 (W.D. La. 1952).

⁵ *Snowden v. Hughes*, 321 U.S. 1 (1943); *Williams v. Mississippi*, *supra* note 2. In the *Snowden* case the Court held that the unlawful administration by officials of a statute fair on its face is not a denial of equal protection by the State, unless there is shown an element of intentional or purposeful discrimination, and a discriminatory purpose will not be presumed. But see *Lane v. Wilson*, 307 U.S. 268 (1939); *Norris v. Alabama*, *supra* note 4; *Yick Wo v. Hopkins*, *supra* note 4. In *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd mem.*, 336 U.S. 933 (1949), the court held that the "Boswell Amendment" to the Alabama State constitution, which required an applicant to "understand and explain" any clause of the Constitution, was a violation of the 14th and 15th amendments, as being discriminatory both in its purpose and its administration.

and ambiguous terms of such tests⁶ render this a heavy burden of proof. Hence, when used in a climate patently hostile to expansion of Negro rights, these tests can and do result in substantial Negro disfranchisement.

While Federal statutes recognize the right of the Negro to vote without discrimination, enforcement of this right must proceed on a case by case basis. The remedies currently available to redress discriminatory application of voter qualifications fall into three classes: criminal prosecutions;⁷ civil suits for damages or equitable relief brought by the complaining Negro;⁸ and equitable actions instituted by the United States in behalf of Negroes subject to such discrimination.⁹ The most effective remedy available to persons aggrieved is found in title VI of the Civil Rights Act of 1960.¹⁰ Once a court has determined that a person has been deprived of the right to vote on account of race or color, this statutory provision authorizes the court to make the further finding, if appropriate, that the deprivation was pursuant to a "pattern or practice." If the court finds such "pattern or practice" of discrimination, it thereafter may issue an order declaring to be a qualified voter any person in the election district who is qualified by State law to vote, and who proves that he has been deprived under color of law of his opportunity to register.¹¹ By permitting future registration in an area to be placed on a nondiscriminatory basis, title VI represents a significant advance in the effort to combat discrimination. Nevertheless, its effectiveness is limited. The Government must still proceed on a case by case basis in each district; the procedure for securing a court order is formidable;¹² and the necessary finding of a "pattern or practice" imposes an overwhelming factual burden on the plaintiff.¹³ As the Commission states in its Report: "While it can be truly said that present laws have proved to be effective tools to deal with discrimination in voting, the tools are limited in scope. There is no widespread remedy to meet what is still widespread discrimination."¹⁴

Both recommendations I and II of the Civil Rights Commission's Report on Voting are designed to provide a broad remedy against the discriminatory application of literacy tests. Recommendation I would have Congress limit permissible State voting qualifications and restrictions to citizenship, residence, confinement at the time of registration or election, age, or commission of a felony;¹⁵ in short, eliminate the literacy test. Recommendation II would provide that evidence of completion of a sixth grade education is sufficient to qualify an applicant under any literacy test,¹⁶ thereby minimizing possible dis-

⁶ E.g., Ala. Code Ann. title 17, secs. 31, 32 (Supp. 1953), requiring an applicant to answer questions concerning his qualifications as an elector; Ga. Const., art. II, sec. 2-704 (1945), requiring a demonstration by the applicant of the duties and obligations of citizenship; La. Rev. Stat. Ann. secs. 24-63, 24-69 (1950), requiring an applicant to give a reasonable interpretation of a clause in the State or Federal constitution.

⁷ 18 U.S.C., sections 241-42, 594 (1954).

⁸ 42 U.S.C., sections 1983, 1985 (3) (1958).

⁹ 42 U.S.C., section 1971 (1958). For an analysis of the effectiveness and limitations of these remedies, see Heyman, *Federal Remedies for Voteless Negroes*, 48 Calif. L. Rev. 190 (1960).

¹⁰ 42 U.S.C., section 1971(e) (supp. II 1958).

¹¹ A court has yet to issue such an order. But in its 1961 Report on Voting at 100, the Civil Rights Commission suggests that the availability of this remedy has led to the issuance of broader equity decrees than might otherwise have been obtained, as in *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959), reviewed, 362 U.S. 17 (1960), 189 F. Supp. 121 (M.D. Ga. 1960); *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961).

¹² See 1961 Report on Voting at 77.

¹³ But see *United States v. Alabama*, note 11 *supra*, where the court, on the basis of a massive factual presentation, made a finding of "pattern and practice" of discrimination.

¹⁴ 1961 Report on Voting at 100.

¹⁵ The full text of recommendation I reads as follows:

"That Congress, acting under sec. 2 of the 15th amendment and secs. 2 and 5 of the 14th amendment, (a) declare that voter qualifications other than age, residence, confinement, and conviction of a crime are susceptible of use, and have been used, to deny the right to vote on grounds of race and color; and (b) enact legislation providing that all citizens of the United States shall have a right to vote in Federal or State elections which shall not be denied or in any way abridged or interfered with by the United States or by any State for any cause except for inability to meet reasonable age or length-of-residence requirements uniformly applied to all persons within a State, legal confinement at the time of registration or election, or conviction of a felony; such right to vote to include the right to register or otherwise qualify to vote, and to have one's vote counted."

Vice Chairman Storer and Commissioner Rankin of the Civil Rights Commission dissented from recommendation I, 1961 Report on Voting at 139-40.

¹⁶ The full text of recommendation II reads as follows:

"That Congress enact legislation providing that in all elections in which, under State law a 'literacy' test, an 'understanding' or 'interpretation' test, or an 'educational' test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education."

criminary application of the tests. Both recommendations of the Civil Rights Commission sanction Federal invasion of a field that traditionally has been within the exclusive jurisdiction of the States. The constitutionality of such legislation is therefore brought into question. This paper will examine the power of Congress in this context.

II. BACKGROUND

Under article I, section 2 of the Constitution, and the 17th amendment, the power to prescribe voter qualifications lies with the States.¹⁷ These sections provide that the qualifications for electors of Members of the House and the Senate shall be the same as those for the most numerous legislative branch of the States they represent. Each State has the power to prescribe qualifications for electors of its legislators;¹⁸ hence, the Constitution indirectly gives the States exclusive jurisdiction to prescribe the qualifications for Federal electors.¹⁹

In addition, article II, section 1 provides that each State shall appoint presidential and vice presidential electors in such manner as its legislature shall direct. Once the State legislature has determined that the presidential electors shall be chosen by popular election,²⁰ the power of the State to prescribe voter qualifications is identical to its power described above with regard to congressional elections.²¹

There is no doubt that in the exercise of this power to prescribe voter qualifications the States are limited by other provisions of the Constitution. They must respect the command of the 14th amendment that no State shall deny to any person the equal protection of its laws;²² that of the 15th amendment, that no State shall deny or abridge the right of any U.S. citizen to vote on account of race, color, or previous condition of servitude;²³ and that of the 19th amendment, that no State shall deny or abridge the right to vote on account of sex.²⁴

Acting within the confines of their constitutional powers, the States have imposed a variety of restrictions on the right to vote. Most common among these are age, residence, and disqualification by reason of a previous criminal record. The constitutionality of such objective and reasonable standards has long been established;²⁵ indeed, it is these qualifications that recommendation I of the Civil Rights Commission's Report on Voting would allow the States to continue to impose.²⁶ However, many States further qualify the right to vote, denying suffrage to paupers,²⁷ mental incompetents,²⁸ persons not of good char-

¹⁷ The applicable provision in article I, section 2 reads as follows: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." The parallel provision in the 17th amendment, covering the election of Senators, states that "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for 6 years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

¹⁸ *Breedlove v. Suttles* (302 U.S. 277); *Pope v. Williams* (193 U.S. 621 (1904)); *Minor v. Happersett* (88 U.S. (21 Wall.) 162 (1874)).

¹⁹ See, e.g., *Wiley v. Sinker* (179 U.S. 58, 63-64 (1900)); *Ex parte Yarborough* (110 U.S. 651, 663-664 (1883)).

²⁰ Popular election has long been the practice in every State, but at one time or another electors for the executives have been chosen by State legislatures without popular vote in at least 16 States. Nineteen hundred and sixty-one Report on Voting at 17. For a historical analysis of the manner of choosing presidential electors, see Dixon, *Electoral College Procedure*, 3 West. Polit. Q. 214 (1950).

²¹ See *McPherson v. Blacker* (146 U.S. 1, 39 (1892)); 1961 Report on Voting at 17.

²² *Snowden v. Hughes*, 321 U.S. 1 (1943); *Nixon v. Condon*, 286 U.S. 70 (1930); *Nixon v. Herndon*, 273 U.S. 536 (1927); *McPherson v. Blacker*, *supra* note 21; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²³ E.g., *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Smith v. Allwright*, 321 U.S. 649 (1944); *Pope v. Williams*, 193 U.S. 621 (1904); *United States v. Cruikshank*, 92 U.S. 542 (1875).

²⁴ Since the enactment of the 19th amendment, there have been few cases dealing with the discriminatory denial of the right to vote on grounds of sex. But, see *Breedlove v. Suttles*, 302 U.S. 277 (1937).

²⁵ E.g., *Lassiter v. Northampton County Bd. of Elections*, *supra* note 23 (dictum) (approving all three requirements generally); *Pope v. Williams*, *supra* note 23 (residence); *Davis v. Beason*, 133 U.S. 833 (1889) (previous criminal record). See also U.S. Constitution amendment XIV, sec. 2, providing for a reduced basis of representation for States which restrict the right to vote on grounds other than age, residence, or previous criminal record.

²⁶ See recommendation I quoted in full at note 15 *supra*; 1961 Report on Voting, at 139.

²⁷ Nine States: Delaware, Maine, Massachusetts, New Hampshire, Rhode Island, South Carolina, Texas, Virginia, West Virginia.

²⁸ Every State except five: Michigan, New Hampshire, Pennsylvania, Tennessee, Vermont.

acter," those who refuse to sign a loyalty oath," and those who fail to pay a poll tax," or who fail to pass a literacy test."

In the absence of a showing of unreasonableness or discriminatory application, the validity of State voter qualifications has repeatedly been upheld.³⁰ As the Supreme Court stated in *Breedlove v. Suttles*,³¹ "save as restrained by the 15th and 19th amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."³² On numerous occasions the Court has specifically upheld the validity of literacy tests.³³ Such tests bear a reasonable relation to the right to vote,³⁴ and in the absence of a showing of discriminatory application, are a valid exercise of the States power to prescribe voter qualifications.³⁵

Congressional power over State and Federal elections supplements that of the States. Congress has the power to alter State regulations or to devise its own regarding the times, places, and manner of holding congressional elections;³⁶ it alone may judge the elections, returns, and qualifications of its own members.³⁷ In addition, Congress has the power to reduce the basis of representation of any State to the extent that such State disfranchises any of its citizens over 21 years of age for reasons other than participation in rebellion or crime.³⁸ While these provisions have served as a source of congressional power over Federal elections which goes beyond that suggested by their literal interpretation,³⁹ at no time has Congress directly attempted to impose its suffrage standards on the States.⁴⁰ When Congress has desired to restrict State standards, it has done so by way of constitutional amendments.⁴¹ Legislation enacted to implement these amendments has been limited to providing remedies against violations of their prohibitions. In effect, Congress has declared that U.S. citizens have the right to be free from discrimination in the exercise of the franchise, and has provided that violations of this right shall be remedied by legal, criminal, or equitable actions.⁴²

³⁰ Four States: Alabama, Connecticut, Georgia, Louisiana.

³¹ Six States: Alabama, Connecticut, Idaho, Mississippi, North Carolina, Vermont.

³² Five States: Alabama, Arkansas, Mississippi, Texas, Virginia.

³³ Twenty-one States require some degree of literacy: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, Oregon, South Carolina, Virginia, Washington, Wyoming.

³⁴ See, e.g., cases cited notes 2 and 25 supra. See also *Breedlove v. Suttles*, 302 U.S. 277 (1937) (poll tax); Opinion of the Justices, 252 Ala. 351, 40 So. 2d 849 (1949) (loyalty oath).

³⁵ 302 U.S. 277 (1937).

³⁶ Id. at 283. Accord, *Guinn v. United States*, 238 U.S. 347 (1914); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1872).

³⁷ See cases cited note 2 supra.

³⁸ See *Lasater v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959), where the Court stated: "The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . In our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise."

³⁹ See cases cited note 2 supra.

⁴⁰ U.S. Constitution, art. I, sec. 4.

⁴¹ U.S. Constitution, art. I, sec. 5.

⁴² U.S. Constitution, amendment XIV, sec. 2. Congressional power over the choice of presidential and vice presidential electors is limited to determining the time of choosing the electors, and the day on which they shall give their votes. U.S. Constitution, art. II, sec. 1.

⁴³ See, e.g., *Burroughs v. United States*, 290 U.S. 534 (1933), (power to protect presidential election from corruption); *Smiley v. Holm*, 258 U.S. 355 (1931), power to protect voters in congressional election (by implication); *Ex parte Yarbrough*, 110 U.S. 651 (1883), (power to punish individuals who interfere with the right to vote in Federal elections). It should be noted that the legislation involved in these cases rests on the powers of Congress under art. I and the 17th amendment. Congress has never implemented the full provisions of sec. 2 of the 14th amendment. For a full discussion of sec. 2 of the 14th amendment, see Zuckerman, "A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment," 30 Fordham Law Review 98 (1961).

⁴⁴ But see S. 478, 87th Cong., 1st sess. (1961), S. 1259, 87th Cong., 1st sess. (1961). Both bills would outlaw the poll tax as a condition to voting in any national election. Compare *The Federalist* No. 60, at 414 (Dunne ed. 1901), where Hamilton stated that the authority of Congress would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the persons who may choose . . . are defined and fixed in the Constitution, and unalterable by the legislature." But see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171, where the Court declared: "The power of the State [to prescribe voter qualifications] is certainly supreme until Congress acts." (dictum) (emphasis added).

⁴⁵ U.S. Constitution, amendment XV, XIX. Compare S.J. Res. 82, 87th Cong., 1st sess. (1961), S.J. Res. 29. The first resolution proposes a constitutional amendment to abolish the literacy test as a qualification for Federal electors; the second resolution proposes a constitutional amendment to abolish the poll tax as a requirement for voting in national elections.

⁴⁶ See notes 7-10 supra and accompanying text.

In upholding such legislation, the Supreme Court has reiterated the general right of Congress to protect and enforce every right arising under the Constitution by such means as it, in the legitimate exercise of its legislative discretion, may deem necessary and appropriate.⁴⁸ But past legislation indicates that Congress has understood its power to be limited to declaring prohibitions, and to providing remedies for violations thereof. Hence, it may be misleading to interpret the Court's broad language regarding legislative discretion as a clear indication that the Court would uphold legislation of an entirely different kind—legislation that would go beyond prohibition and remedy to regulate broadly an area previously understood to be within the sole jurisdiction of the States.

III. RECOMMENDATION I

In its 1961 Report on Voting, the U.S. Commission on Civil Rights recommended that Congress provide that no State shall qualify the right to vote in Federal or State elections for reasons other than citizenship, residence, confinement at the time of registration or election, age, or commission of a felony.⁴⁹ This recommendation was based on the Commission's findings that other qualifications, such as literacy or good character, are susceptible to discriminatory application and are in fact used to several States to disfranchise the Negro.⁵⁰

The strongest arguments supporting such legislation must rest on the power of Congress to enact "appropriate legislation" under the 14th amendment to ensure U.S. citizens the equal protection of the laws, and under the 15th amendment to protect U.S. citizens from denial of the right to vote on grounds of race.⁵¹ There cannot be any precise definition of "appropriate legislation;"⁵² the validity of each statute must depend on the circumstances giving rise to its enactment. As a result, the circumstances that prompted the Commission to adopt recommendation I are relevant to a determination of the "appropriateness" and constitutionality of the legislation it proposes.

⁴⁸ E.g. *Burroughs v. United States*, 290 U.S. 534 (1933); *Ex parte Yarbrough*, 110 U.S. 615 (1883); *Strauder v. West Virginia*, 100 U.S. 810 (1879). Accord, *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959); *United States v. McEivoe*, 177 F. Supp. 355 (E.D. La. 1959), aff'd, sub nom., *United States v. Thomas*, 80 Sup. Ct. 612 (1957).

⁴⁹ 1961 Report on Voting at 189. The full text of the recommendation is quoted in note 15 supra.

⁵⁰ *Ibid.* Three of the complaints received by the Commission involved Puerto Ricans disfranchised because not literate in English. The 1961 Report on Voting does not treat this problem, since it is not strictly within the scope of the Commission's authority. 1961 Report on Voting at 18. However, it should be noted that the broad terms of recommendation I would abolish the requirement that an applicant be literate in English. For a case upholding the validity of an English literacy requirement, see *Comacho v. Doe*, Misc. 2d—, 221 N.Y.S. 2d 262 (1961).

⁵¹ It is arguable that Congress has the power to enact the legislation under U.S. Constitution, article IV, section 4, which provides that the United States shall guarantee to every State a republican form of government. Although there is no precise definition of what constitutes a republican form of government, it is clear that the right of suffrage is an inherent element of such a government. (*In re Duncan*, 189 U.S. 449 (1890); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).) It could be argued, therefore, that by disfranchising a substantial number of their citizens through the imposition of voter qualifications, the States are denying their citizens the right to a republican form of government, and article IV, section 4, grants Congress the power to remedy the situation. However, this argument would seem to be undermined substantially by the language of the Supreme Court in *Minor v. Happersett*, supra, as well as by section 2 of the 14th amendment. In *Minor v. Happersett* the Court held that it was not a denial of a republican form of government for a State to deny women the right of suffrage. The Court reached this conclusion by applying the standard of the form of State governments at the time the Constitution was adopted. Since at that time not all citizens of the States were invested with the right of suffrage, the Court stated that "It is certainly now too late to contend that a government is not republican, within the meaning of his guarantee in the Constitution, because women are not made voters." (88 U.S. (21 Wall.) 162, 176 (1874).) This test would similarly uphold voter qualification laws. In addition, by providing for a reduction in the basis of representation of States which deny the right to vote on grounds other than those enumerated (age, residence, crime), section 2 of the 14th amendment implicitly recognizes the existence of other voter qualifications. This constitutional recognition would seem to imply that a State's disfranchisement of certain of its citizens through voter qualifications does not deprive that State of a republican form of government. See *Minor v. Happersett*, supra at 174.

⁵² A general definition of "appropriate legislation" under the 14th amendment was provided by the Supreme Court in *Ex parte Virginia* (100 U.S. 339 (1879)). In upholding a statute making it a misdemeanor to exclude persons from a jury solely on grounds of race, the Court stated:

"Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional powers. (Id. at 345-346.)

The Commission's findings make it clear that by discriminatory application of voter qualifications valid on their face, certain Southern States are in fact denying a considerable segment of their population equal protection and the right to vote. However, the Commission prefaced its discussion of specific instances of Negro disfranchisement with the observation that today the majority of Negro American citizens do not suffer discriminatory denial of their right to vote.⁵¹ Apparently the problem exists only in eight Southern States,⁵² and in three of these eight States, only in certain isolated counties.⁵³ Moreover, even in the five remaining States discrimination against Negro suffrage is not uniform; rather, it exists on something like a "local option" basis.⁵⁴ Private litigation has played an important role in curbing previously successful attempts to keep the Negro from effective exercise of his right to vote.⁵⁵ And continued vigorous invocation of the Civil Rights Acts of 1957 and 1960 is expected to further to reduce discriminatory denial of the right to vote.⁵⁶

While discrimination exists in only 8 of the 50 States, 21 States impose some form of literacy test as a means of voter qualification.⁵⁷ Furthermore, two of the Southern States where discrimination is practiced do not impose a literacy requirement as a qualification for voting.⁵⁸ In these States, as well as in many of the other six, the most formidable obstacles to Negro suffrage are threats of retaliation and economic reprisals.⁵⁹

Finally, it should be noted that the Civil Rights Commission failed to make any finding regarding the discriminatory application of the voter qualifications other than literacy tests which would be eliminated by recommendation I. As seen above,⁶⁰ many States deny suffrage to paupers, mental incompetents, those who fail to pay a poll tax, and those who refuse to sign a loyalty oath. Although primarily concerned with abuses in the administration of the literacy test, recommendation I would abolish the use of these other qualifications as well.

With these facts as a background, it seems doubtful that legislation severely restricting the permissible scope of State voter qualifications in all States would qualify as an "appropriate" means of remedying the relatively limited violations of the 14th and 15th amendments through the maladministration of literacy tests. These doubts would seem to be confirmed by language in the cases dealing with the effect of the 14th and 15th amendments and the power of Congress thereunder.

Since the States involved have generally abandoned attempts to disfranchise the Negro by voter qualification laws that are patently arbitrary and discriminatory,⁶¹ support for recommendation I from the 14th amendment would be based on its proscription of discriminatory application of laws valid on their face. It is clear that a court will declare void a statute which is susceptible to arbitrary and discriminatory application and which in fact is so applied.⁶²

⁵¹ 1961 Report on Voting at 22.

⁵² *Ibid.* These States are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

⁵³ 1961 Report on Voting at 22.

⁵⁴ *Ibid.* For a discussion of the nature and extent of the discrimination practiced in each of these eight States, see 1961 Report on Voting at 22-72.

⁵⁵ 1961 Report on Voting at 21. Of particular significance is *Smith v. Allwright* (321 U.S. 649 (1944)), in which the "white primary" was declared unconstitutional. (Prior to this holding, the Negro was barred from voting in southern primary elections for the nomination of party candidates on the pretense that the local political party, as a private organization, could condition its membership as it chose.)

⁵⁶ 1961 Report on Voting at 99-100. For an appraisal of Federal litigation under the Civil Rights Acts of 1957 and 1960, see 1961 Report on Voting at 79-100.

⁵⁷ See States listed note 32 *supra*.

⁵⁸ Florida and Tennessee.

⁵⁹ In Liberty County, Fla., Negroes who registered to vote were subjected to burning crosses, fire bombs, and threatening telephone calls ("1961 Report on Voting" at 28-29). In Fayette and Haywood Counties, Tenn., Negro registration resulted in severe economic retaliation. *Id.* at 36-37. Acting under the Civil Rights Act of 1957 (42 U.S.C., sec. 1971(b) (1958)), which provides that no person shall intimidate, threaten, or coerce any other person for the purpose of interfering with the other person's right to vote, the Federal Government sued in Fayette and Haywood Counties to enjoin the economic reprisals. *United States v. Beatty* (288 F.2d 653 (6th Cir. 1961)). A temporary restraining order was issued against eviction of the sharecropper-tenants by the landlord defendants, to be effective pending final disposition of the cases in the district court.

⁶⁰ See text accompanying notes 27-31 *supra*.

⁶¹ E.g., the "grandfather clause," held invalid in *Gunn v. United States* (238 U.S. 347 (1914)); restrictive registration procedures intended to effectuate the purpose of the "grandfather clause," invalidated in *Lane v. Wilson* (307 U.S. 268 (1939)); the "white primary," invalidated in *Smith v. Allwright* (321 U.S. 649 (1944)), literacy tests which permit the absolute and arbitrary exercise of the registrar's discretion, invalidated in *Davis v. Schnell* (81 F. Supp. 872 (S.D. Ala. 1949), *aff'd mem.*, 336 U.S. 933 (1949)).

⁶² E.g., *Davis v. Schnell*, *supra*, note 61; *Yick Wo v. Hopkins* (118 U.S. 356 (1886)).

Similarly, a court will nullify sophisticated attempts to disfranchise the Negro under statutes that seemingly impose neutral qualifications, but in practice apply mainly to the Negro or inherently operate to disfranchise him.⁶² Although a State may prescribe the means and mode of exercising a political right or privilege, it cannot restrain the right itself by arbitrarily exercising its legislative power.⁶³ Hence, the reasonableness of voter qualification laws is always subject to judicial review.⁶⁴ It does not necessarily follow, however, that the legislative power of Congress to enforce these principles would include the power to restrict the right of all States, under all circumstances, to prescribe voter qualifications other than those set forth in the recommendation.

The nature of the congressional power to legislate under the 14th amendment was given careful consideration by the Supreme Court in the civil rights cases.⁶⁵ Discussing the effect of the equal protection clause, the Court said: "It is absurd to affirm that * * * because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection."⁶⁶ The amendment empowered Congress to adopt "not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. * * *"⁶⁷ This interpretation is more fully developed in *Missouri v. Lewis*,⁶⁸ where the Court stated that the equal protection clause was meant not to secure to all persons within the United States the benefit of the same laws and remedies, but rather, merely to guarantee that no class of persons shall be denied the same protection of the laws which is enjoyed by other persons in the same place and under like circumstances.⁶⁹ And again, in *In re Ruhrer*⁷⁰ the Court said: "The 14th amendment, in forbidding a State * * * to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with the power to legislate upon subjects which are within the domain of State legislation."⁷¹

These cases clearly distinguish between the power of Congress to negate State legislation or State enforcement of the laws which contravenes the 14th amendment, and its power to legislate affirmatively with regard to the rights it seeks to protect. As these cases indicate, the latter power has never been approved.⁷² Yet legislation enacted pursuant to recommendation I would tell the States not that they must provide equal protection in their prescription or administration of voter qualifications, but rather, that they may only impose certain congressionally determined voter qualifications. In view of the judicial recognition of the validity of literacy tests and other State voter qualifications when applied without discrimination, and the relatively exceptional instances of discriminatory application, it appears unlikely that the Court, on the basis of the equal protection clause, would uphold Federal legislation depriving the States of the right to impose such valid restrictions.

Many of the objections to the 14th amendment as a basis for the suggested legislation apply to the 15th amendment as well. The 15th amendment forbids denial of the right to vote on grounds of race, and gives Congress power to enact "appropriate legislation" to enforce this prohibition. But it would seem unlikely that this power, any more than that granted by the 14th amendment, is sufficiently broad to support legislation which not only forbids the States from imposing qualifications based on race, but prescribes the only qualifications that the States may impose.

⁶² *Lane v. Wilson* (307 U.S. 268 (1939)); *Guinn v. United States* (238 U.S. 347 (1914)).

⁶³ *Yick Wo v. Hopkins* (118 U.S. 356 (1886)).

⁶⁴ *Ibid.*; *Lassiter v. Northampton County Bd. of Education* (360 U.S. 45 (1959)).

⁶⁵ 109 U.S. 3 (1883).

⁶⁶ *Id.* at 13.

⁶⁷ *Ibid.*

⁶⁸ 101 U.S. 22 (1879).

⁶⁹ *Id.* at 31.

⁷⁰ 140 U.S. 545 (1891).

⁷¹ *Id.* at 554-555. Accord, *United States v. Cruikshank*, 92 U.S. 542 (1875). In the *Cruikshank* case, the Court stated:

"Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle [of equality of rights], if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the [14th] amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty." *Id.* at 555.

⁷² *Cf. Shelley v. Kramer*, 334 U.S. 1 (1948).

⁷³ Compare "Harris, The Quest for Equality" (1960), suggesting that the equal protection clause is a potential source of affirmative legislative power.

After passage of the 15th amendment, the Supreme Court in *Guinn v. United States*⁷⁴ stated that the power to regulate suffrage remained with the States; the 15th amendment merely affected the exercise of that power with regard to the particular subject with which it dealt, that, is race.⁷⁵ Accordingly, the Court held that Oklahoma's grandfather clause⁷⁶ was a violation of the 15th amendment as an attempt to continue the discriminatory conditions that existed before the amendment. But the Court accepted as valid the State's literacy test, except insofar as that test was an intrinsic part of Oklahoma's grandfather clause.⁷⁷

In *United States v. Reese*⁷⁸ the Court described the effect of the 15th amendment to be merely the elimination of one restriction on the right to vote: that of race. "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is."⁷⁹ Again the Court recognized the continuing right of the States to impose qualifications applicable to all their citizens alike.⁸⁰

In addition to usurping a power left in the States, enactment of the suggested legislation would operate to confer the right of suffrage on persons the States could otherwise validly disfranchise. It has repeatedly been said that the Constitution does not directly confer the right of suffrage on anyone.⁸¹ But once the States have determined who shall vote, the right of those persons is thereafter secured by the Constitution.⁸² Similarly, the effect of the 15th amendment was not to confer the right to suffrage on anyone, but merely to insure that that right is not denied on the basis of race.⁸³

Referring to the effect of the 14th and 15th amendments, the Court in *McPherson v. Blacker*⁸⁴ said: "The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote. * * *"⁸⁵

Yet the suggested legislation would confer the right to vote on every citizen who meets the particular age and residence requirements of the State, and who has not been convicted of a felony nor confined at the time of registration or election. It would grant the right of suffrage to persons who previously had been disfranchised on valid grounds: mental incompetence, pauperism, failure to sign a loyalty oath, or failure to pass literacy or language tests applied without discrimination.

*United States v. Reese*⁸⁶ indicates that the power of Congress under the 15th amendment does not extend so far. In that case the Court held void a Federal statute which punished "wrongful" refusals by local registrars to register voters in Federal or State elections. The Court stated that the power of Congress to legislate at all upon the subject of voting in State elections rests upon the 15th amendment. As a result, Congress could punish "wrongful" refusals to register applicants only when the refusals were based upon considerations of race or color.⁸⁷ Although the facts in *Reese* did show racial discrimination, the Court held that the broad wording of the statute, authorizing punishment of refusals that might be wrongful for reasons other than race, rendered the legislation beyond the power of Congress under the 15th amendment. In short, the statute did not qualify as "appropriate legislation" to punish racial discrimination in the right to vote.⁸⁸

⁷⁴ 238 U.S. 347 (1914).

⁷⁵ *Id.* at 369.

⁷⁶ A "grandfather clause" is a provision exempt from voter qualification tests persons whose ancestors were qualified to vote prior to 1866, thus, in effect making the tests applicable only to Negroes.

⁷⁷ 238 U.S. at 366-367.

⁷⁸ 92 U.S. 214 (1875).

⁷⁹ *Id.* at 217-218.

⁸⁰ *Ibid.*

⁸¹ E.g., *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, *supra* note 78; *Minor v. Happers*, 88 U.S. (21 Wall.) 162 (1874).

⁸² *Willou v. Sinker*, 179 U.S. 58 (1900); *Ex Parte Yarbrough*, 110 U.S. 651 (1883).

⁸³ *McPherson v. Blacker*, 146 U.S. 1 (1892); *United States v. Cruikshank*, *supra* note 81; *United States v. Reese*, *supra* note 78.

⁸⁴ 146 U.S. 1 (1892).

⁸⁵ *Id.* at 39. The Court was referring specifically to the right to vote for presidential electors, but the enunciated principle would apply to other elections as well.

⁸⁶ 92 U.S. 214 (1875).

⁸⁷ *Id.* at 218.

⁸⁸ *Id.* at 220-221. Cf. *James v. Bowman*, 190 U.S. 127, 136, 140 (1903); *Korem v. United States*, 121 F. 250, 259 (1903). Compare *United States v. Raines*, 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd*, 362 U.S. 17 (1960).

While the statute in the *Reese* case would have been dependent for its effectiveness upon particular actions brought to enforce its provisions, and hence would have given each individual defendant the opportunity to challenge its validity as applied to him, the legislation proposed by recommendation I would automatically apply to all States. By legislative fiat it would finally abolish all State voter qualifications other than those set forth in the recommendation. As a result, the principle of the *Reese* case, viz, that Congress must restrict its corrective legislation to cover only the specific evils that it has power to cure, would seem to apply with even greater force to invalidate the legislation proposed by recommendation I—legislation that would summarily eliminate from permissible State voter qualifications criteria that are not necessarily related to race,⁶⁰ and that previously have been upheld.

IV. RECOMMENDATION II

Recommendation II of the Civil Rights Commission's Report on Voting provides an alternative solution to the problem of discriminatory application of literacy tests. This recommendation proposes that Congress enact legislation providing that all elections in which, under State law, a "literacy" test, an "understanding" or "interpretation" test, or an "educational" test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education.⁶¹

Legislation enacted pursuant to recommendation II would have two advantages over that proposed by recommendation I. First, it would be directed to the central problem, which is not State imposition of voter qualifications per se, but rather, the use of these valid qualifications for a forbidden end. Second, it would be specifically directed to the particular State voter qualifications that the Commission has found to be subject to abuse: the various forms of the literacy test. These two factors would seem to have an important bearing on the constitutionality of such legislation.

In considering the legislation proposed by recommendation II, two bills currently pending before Congress should be compared. The first bill, introduced by Senator Javits, would permit any person who has completed the sixth grade, and who is otherwise qualified by law to vote, to vote at any election without subjection to a literacy test.⁶² The second bill, introduced by Senator Mansfield, and applicable only to Federal elections, would permit any person who has completed the sixth grade, either in the United States or in Puerto Rico, and who is otherwise qualified by law to vote, to vote in any Federal election regardless of his performance in any examination.⁶³

Both bills would rest on the following congressional findings: (1) That many persons have been subjected to arbitrary and unreasonable voting restrictions on account of their race or color; (2) that literacy tests have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons; (3) that persons who have completed six primary grades in a public or accredited private school cannot reasonably be denied the franchise on grounds of illiteracy.⁶⁴ The important distinction between the two bills is that the Javits bill, like recommendation II, would apply to both State and Federal elections, whereas the Mansfield bill would apply to Federal elections only.⁶⁵ As a result, the two bills present separate constitutional issues.

The constitutionality of legislation applicable to both Federal and State elections would derive from the 14th and 15th amendments. The power of Con-

⁶⁰ *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). In that case the Court, in upholding a literacy test as a valid exercise of the States' power to prescribe voter qualifications, took judicial notice of studies showing that the ability to read or write is unrelated to race, creed, or sex. See also, cases cited, notes 25 and 33 supra, upholding the validity of the other voter qualifications which recommendation I would abolish.

⁶¹ 1961 Report on Voting at 141. The full text of recommendation II is quoted in note 16, supra.

⁶² S. 480, 87th Cong., 1st sess. (1961).

⁶³ S. 2750, 87th Cong., 2d sess. (1962).

⁶⁴ Ibid. S. 480, 87th Cong., 1st sess. (1961).

⁶⁵ An additional distinction is that the Mansfield bill further provides that completion of a sixth grade education in Puerto Rico would be sufficient to qualify under any examination; hence, this bill would eliminate English literacy requirements. This provision raises a constitutional issue separate from the power of Congress to combat discrimination, viz, whether Congress may abolish a State's requirement that its electorate be literate in English. As a result, the constitutionality of this aspect of the Mansfield bill is beyond the scope of this note. For a case upholding the validity of an English literacy requirement, see *Oomacho v. Doe*, — Misc. 2d —, 221 N.Y.S. 2d 262 (1961).

gress to enact appropriate legislation under the equal protection clause of the 14th amendment, and under the 15th amendment has been considered in detail with regard to recommendation I.⁶⁶ Although legislation summarily abolishing all voter qualifications other than age, citizenship, residence, confinement, or commission of a crime would seem to exceed the power of Congress under those amendments, the same conclusion would not necessarily follow with regard to legislation enacted pursuant to recommendation II. The two may be profitably compared.

While recommendation I would substantially deprive the States of their recognized right to prescribe voter qualifications, recommendation II would merely substitute a congressional standard of literacy, i.e., completion of the sixth grade, for the standards embraced by the States in their various literacy tests. The right of the States to impose literacy tests, although abridged, would continue. Persons who had not completed the sixth grade would still be subject to a State-imposed literacy test; and the State could, if it chose, apply in every case a standard of literacy below that evidenced by a sixth grade education. Moreover, the power of the States to prescribe other grounds for voter disqualification, such as mental incompetence, pauperism, failure to pay a poll tax, and failure to sign a loyalty oath, would remain unaffected.

While the Civil Rights Commission's findings with respect to discriminatory application of voter qualifications do not support the broad terms of recommendation I, these findings do provide support for the terms of recommendation II. The Commission's report leaves no doubt that a substantial number of Negroes are deprived of the equal protection of the laws and the right to vote by the maladministration of literacy tests. As expressed by another commentator, "the southern literacy test is a fraud and nothing more. * * * In practice literacy and understanding have little to do with the acquisition of the right to vote."⁶⁷

The remedies currently available to combat this abuse have proved to be inadequate. As the Commission states in its report: "Although the provisions of the 1957 and 1960 Civil Rights Acts are useful * * * they are necessarily limited means for removing racial discrimination from the franchise. Suits must proceed a single county at a time, and they are time consuming, expensive, and difficult. Broader measures are required if denials of constitutional rights in this area are to be quickly eliminated."⁶⁸ Congress, by the terms of the Javits bill, has similarly found that "laws presently in effect are inadequate to assure that all qualified persons shall enjoy this essential right [to vote] without discrimination on account of race or color."⁶⁹ Furthermore, whatever effectiveness suits brought under the Civil Rights Acts might have with regard to the maladministration of literacy tests, it is doubtful that these suits could protect against a different sort of danger: the future enactment of extremely strict voter qualification laws in areas with permanent registration. The Commission explains the problem in this manner: "Even though there is no racial discrimination in the prospective application of such stringent standards, the effect of such a change in practice may be to perpetuate discrimination which has previously occurred: for if virtually all the eligible whites have already been registered, but Negroes have been discriminatorily kept from registering, then Negroes will bear the brunt of the difficulties imposed by the new and stringent registration requirements."⁷⁰

However, it has been suggested that title VI of the Civil Rights Act of 1960, discussed in text accompanying note 10 *supra*, provides a potential weapon against the future imposition of stringent standards. Under title VI, once a court finds that a "pattern or practice" of discrimination exists, it may thereafter register any applicant who is qualified under State law to vote, and who has since such finding by the court been deprived of the opportunity to register. Under the theory in question, "qualified under State law to vote" would be interpreted to mean qualified according to the usage and practice of the district, rather than merely qualified under the legally enacted voter qualification provisions. Hence, once it had been found that the voter qualification laws were not being applied to whites, or more lax standards were being applied to whites than to Negroes, the qualification standard would be frozen at the level previously

⁶⁶ See text commencing with note 49 *supra*.

⁶⁷ Rev. "Southern Politics," p. 560 (1949).

⁶⁸ 1961 Report on Voting, finding No. 8 at 136.

⁶⁹ S. 480, 87th Cong., 1st sess. (1961).

⁷⁰ 1961 Report on Voting, finding No. 13 at 138.

applied to whites. Otherwise, by raising the standards for qualification of future voters, the State would in effect be able to perpetuate past discrimination, particularly in areas with permanent registration, since most of the eligible whites would already be registered. Support for this theory may be found in cases invalidating grandfather clauses, e.g., *Guinn v. United States*, 238 U.S. 347 (1914). In the *Guinn* case the Court held that even though Oklahoma's new voter qualifications were to be applied to all registrants alike, by exempting all persons qualified to vote prior to 1896 they were discriminatory both in purpose and effect, and hence, a violation of the 15th amendment.

With these considerations as a background, it would seem that the Javits bill would readily qualify under the 14th and 15th amendments as appropriate legislation to secure to the Negro his constitutional right to be free from discrimination in the exercise of the franchise. The Supreme Court has stated that "what-ever precisely may be the reach of the 15th amendment, it is enough to say that * * * discrimination by State officials * * * against the voting rights of U.S. citizens, on grounds of race or color is certainly * * * subject to the ban of that amendment, and that legislation designed to deal with such discrimination is appropriate legislation under it."¹⁰⁰ By establishing an objective, universal standard of literacy, the Javits bill would preclude the discriminatory application of literacy tests, yet would preserve to States that are legitimately concerned with the ability of their electorate to read and write the opportunity to impose this qualification by the requirement of completion of a sixth grade education. In addition, the Javits bill would protect the Negro against the potential inequities of newly enacted stringent standards in areas with permanent registration.

While congressional power over State elections must rest on the 14th and 15th amendments,¹⁰¹ congressional power over Federal elections is not similarly confined. By restricting the terms of recommendation II to Federal elections, Congress could find additional support for its legislation in article I of the Constitution and the 17th amendment. But such a restriction also would raise a distinct constitutional issue, i.e., whether the Constitution permits the imposition of separate qualifications for Federal and State electors—the effect of the Mansfield bill.

Article I, section 2 and the 17th amendment provide that members of the House and the Senate shall be chosen by the people of the several States. Although the States provide the standards for the qualifications of voters,¹⁰² it has been held that the right of the people to vote for Members of Congress is founded in the Constitution.¹⁰³ In addition, article I, section 4 of the Constitution grants Congress power to regulate the times, places, and manner of holding elections for congressional offices. These provisions, together with the doctrine of implied powers, have repeatedly served as a source of a general congressional power to safeguard the purity and effectiveness of Federal elections; they similarly should serve as a basis for congressional authority to protect Federal electors from discriminatory denial of the right to vote.

The doctrine of implied powers was given careful consideration by the Supreme Court in *Ex parte Yarbrough*,¹⁰⁴ a case involving the constitutionality of a statute authorizing criminal prosecution of persons who conspired to deprive any person of the free exercise of his rights, including his right to vote.¹⁰⁵ Rejecting the contention that the power of the Government over Federal elections is limited to those powers expressly granted by the Constitution, the Court stated:

"It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle,

¹⁰⁰ *United States v. Raines*, 362 U.S. 17, 25 (1960).

¹⁰¹ The privilege to vote in State elections is within the sole jurisdiction of the States provided that no discrimination is made between individuals in violation of the Constitution." *Pope v. Williams*, 193 U.S. 621, 632 (1904). (Emphasis added.) As a result, the power of Congress to regulate State voter qualifications must rest solely on the 14th and 15th amendments, whereas Congress may look to other provisions of the Constitution for power to regulate Federal voter qualifications.

¹⁰² See text accompanying notes 17–21; U.S. Const. art. I, sec. 2; U.S. Const. amend. XVII.

¹⁰³ *Swafford v. Templeton*, 185 U.S. 497 (1901); *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Ex parte Yarbrough*, 110 U.S. 651 (1883). The right to vote for Members of Congress should be distinguished from the right to vote for State officials; the latter right is not founded in the Constitution. See note 101 *supra*.

¹⁰⁴ 110 U.S. 651 (1883).

¹⁰⁵ 18 U.S.C. 241 (1958).

in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers * * *." ¹⁰⁶

The Court further stated that "it is not true * * * that electors for Members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the States." ¹⁰⁷ The Court concluded that the general power of Congress under article I, section 2 included the implied power to free the voter from violence in the exercise of his right to vote. ¹⁰⁸

In *Smiley v. Holm*, ¹⁰⁹ the Court again rejected a narrow interpretation of the power of Congress over the election of its members. The Court construed article I, section 4, giving Congress power to regulate the times, places, and manner of holding congressional elections, as including the authority to:

"provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices * * *; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary to enforce the right involved." ¹¹⁰

Although the express power of Congress over presidential elections is more limited than its power over congressional elections, the doctrine of implied power has been applied here as well. Article II, section 1 of the Constitution provides that each State may appoint presidential electors in such manner as its legislature may deem appropriate; the power of Congress extends only to determining the time of choosing the electors and the day on which they shall give their votes. But in *Burroughs v. United States*, ¹¹¹ the Court rejected the contention that the Federal Corrupt Practices Act was an unwarranted invasion of State power. The Court stated:

"Congress, undoubtedly, possesses that power [to safeguard presidential elections from improper use of money] as it possesses every other power essential to preserve the departments and institutions of the general government from impairment and destruction. * * * The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress." ¹¹²

While the Court in the *Burroughs* case emphasized that the legislation there under consideration did not interfere with the power of the States to appoint, or to determine the manner of appointing, presidential electors, the Court's primary concern in that case, as well as in the other two, was with the fundamental power of Congress to protect every aspect of the Federal electoral process from corruption. By the terms of the Mansfield bill, Congress has found that literacy tests have been used extensively to effect arbitrary and unreasonable denials of the right to vote; that the right to vote in Federal elections should be maintained free from discrimination and other corrupt influence; and that it is the duty of Congress to protect the integrity of the Federal electoral process. ¹¹³ These findings would seem to provide a sound basis for the application of the doctrine of implied powers, as recognized in the cases discussed above. Indeed, as the Court stated in *Ex parte Yarbrough*, ¹¹⁴ the proposition "that a government whose essential character is republican, whose executive head and legislative body are both elective, * * * has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration." ¹¹⁵ The Court has consistently rejected this proposition; it seemingly would continue to do so in the future.

While the power of Congress to safeguard the Federal electoral process from corruption would seem to be clear, legislation designed to achieve this end by regulating voter qualifications presents a separate constitutional issue. This issue is whether the Constitution permits the imposition of different qualifications for Federal and State electors—the effect of the Mansfield bill.

¹⁰⁶ 110 U.S. at 658.

¹⁰⁷ *Id.* at 663-64.

¹⁰⁸ *Id.* at 651.

¹⁰⁹ 285 U.S. 305 (1931).

¹¹⁰ *Id.* at 368.

¹¹¹ 290 U.S. 534 (1934).

¹¹² *Id.* at 548, 547-548.

¹¹³ S. 2750, 87th Cong., 2d sess. (1962).

¹¹⁴ 110 U.S. 651 (1883).

¹¹⁵ *Id.* at 657.

Article I, section 2 of the Constitution and the 17th amendment provide that the qualifications for electors of Members of the House and the Senate shall be the same as those for the most numerous legislative branch of the States they represent. But in the area of literacy tests, the Mansfield bill would vary the qualifications of Federal and State electors, permitting Federal electors to satisfy any State literacy test by presenting evidence of a sixth grade education. It would seem that a variance would violate the language of the Constitution, as well as the intent of its framers. Discussion in *The Federalist* of the constitutional provision for the determination of Federal voter qualifications clearly indicates that the qualifications were aligned with those of State electors not as a matter of convenience, but as the result of a conscious policy choice:

"The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason. * * * To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within our option."¹⁶

If Congress were able to overcome the import of the constitutional provisions aligning Federal voter qualifications with those of State voters, the imposition of separate qualifications for Federal electors still would present complex administrative problems. Most obvious among these would be the necessity of providing separate machinery for registration and balloting in State and Federal elections. Of course, it might be hoped that these administrative burdens would induce the States to adapt their qualifications for State electors to those of Federal electors. But the limited scope of legislation directed only to Federal elections, as well as the constitutional and practical problems to which it would give rise, strongly suggest the desirability of Congress giving primary consideration to the Javits bill.

V. CONCLUSION

The courts have repeatedly recognized the exclusive power of the States to prescribe voter qualifications within the limits of the Constitution. The effect of the 14th and 15th amendments was to invalidate State action which denied a citizen equal protection of the laws, or the right to vote on account of race. These amendments gave Congress power to legislate regarding matters previously within State control only insofar as necessary to protect the individual against forbidden State action. In view of the Commission's findings that discrimination against Negroes in their exercise of the right to vote arises primarily from the maladministration of literacy tests, it seems doubtful that congressional power to enact appropriate legislation under the 14th and 15th amendments would support legislation restricting the right of the States to prescribe voter qualifications to certain minimal, federally prescribed criteria, as suggested by recommendation I.

Although it is probable that legislation enacted pursuant to recommendation I would be held unconstitutional, it does not follow that Congress is without power to protect the Negro from discrimination in his exercise of the right to vote. An alternative means is provided by the Commission's recommendation II. The basic terms of this recommendation are now embodied in both the Javits and the Mansfield bills, the former applicable to State and Federal elections, the latter to Federal elections alone. The constitutional doubts raised by the Mansfield bill, the administrative problems it would present, and particularly its limited scope, render it the less attractive solution to the problem. The Javits bill, on the other hand, would seem to afford an effective solution to the problem.

There is no doubt that substantial discrimination against the Negro in his exercise of the right to vote exist, and that one of its primary forms is in the maladministration of literacy tests. Existing Federal legislation has proved inadequate to cure this evil. Congress, under the 14th and 15th amendments, has the power to enact "appropriate legislation" to combat this discrimination. The Javits bill, by preserving to the States their fundamental right to prescribe voter qualifications, yet securing to the Negro the equal opportunity to cast his ballot free from the arbitrary and discriminatory administration of literacy tests, should readily qualify as "appropriate legislation."

¹⁶ *The Federalist* No. 52, at 359-360 (Dunne ed. 1901) (Hamilton or Madison).

GEORGETOWN UNIVERSITY LAW CENTER

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HON. SAM J. ERVIN, Jr.,
Senate Office Building, Washington, D.C.

DEAR SENATOR: I am sure, as you well realize, that the U.S. Supreme Court (or for that matter, any other judge) would demand as of right that it have adversary presentation of both sides of the issues raised in your recent letter as to the constitutionality of S. 2750 and S. 480, with briefs and oral arguments, plus time for their own research and deliberation. Remembering that this is their sole function, you can see that professors of constitutional law with another principal task must demand at least this before arriving at a conclusion on matters as important as these.

An answer that I would professionally give would require full investigation of the intent of the members of the Constitutional Convention and the members of the State ratifying conventions relative to the first article. Furthermore, since an answer requires consideration of the effect of the 15th amendment, I would have to investigate fully the intent of Congress and the ratifying conventions relative to the meaning of the implementing clause of the amendment. In addition to this, since you would like my views on the "desirability" of the proposed bills, I should have to verify their findings and innuendos that (a) literacy tests are being used as a vehicle for racial discrimination; (b) that our Spanish-speaking citizens are being denied the ballot; and (c) that every sixth grade graduate in our land is capable of understanding the electoral process and the issues facing our people. These are not easy judgments that I want to make in a few moments or a few days.

Additionally, I am somewhat upset by a growing inclination on the part of Members of Congress and the press to indulge in a "Gallup poll jurisprudence" wherein the tabulated views of constitutional law professors are set forth. I am sure that if the result is 150 to 3, the 3 might well be right if they would include Prof. Paul Kauper of Michigan, Paul Freund, and Arthur Sutherland of Harvard. No one in Congress would, I imagine, think of asking all the Federal judges in the country to set forth their views on such a matter and, of course, they are public servants. Let me suggest that you professionalize the relations of the law-teaching group to your subcommittee by arranging an amply remunerated arrangement with the indicated law professors or, for that matter, Prof. Douglas Maggs of your own State who is both completely objective and scholarly, to make the necessary studies indicated. Anything less from any constitutional law professor is inevitably hasty and superficial and not the sort of thing you deserve. I have reason to believe the Civil Rights Commission presently employs such law professors for professional consultation. Surely your Commission would have equal rights.

Should you desire to visit with me in my chambers I shall be delighted to talk with you at any time.

Sincerely yours,

C. J. ANTIEAU, *Professor of Law.*

GONZAGA UNIVERSITY LAW SCHOOL

MEMORANDUM ON THE CONSTITUTIONALITY OF S. 2750, S. 480, AND S. 2979 SUBMITTED TO THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, U.S. SENATE BY REV. FRANCIS JAMES CONKLIN, S.J., LL.B., PROFESSOR OF LAW, GONZAGA UNIVERSITY, SPOKANE, WASH., MEMBER OF THE BAR, STATE OF WASHINGTON

ARTICLE I, SECTION 2

Commencing with the general consensus that the new charter of Government being written in Philadelphia in 1787 should be republican in form, the Founding Fathers proceeded to disagree, and ultimately achieve a pragmatic compromise upon every specific point brought to their attention. Although all conceded that the new Government should derive its powers from "the consent of the governed" the practical implementation of the principle occasioned lengthy debates.

The early sessions of the convention determined that the members of at least one branch of the National Legislature should be chosen by the people rather

than appointed by the State legislatures, and then left it up to the committee of detail to carry this policy into execution.¹ The fragmentary records from that committee indicate that the present article I, section 2 originally contained language empowering the Congress to set uniform qualifications for voters to prevail throughout the States or to alter and supersede the requirements set by the States.² However, any intimation of such a power was deleted from the clause proposed to the convention on August 6:

"The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures."³

On August 7 the questions of qualifications for voters in national elections was debated at great length. Gouverneur Morris proposed that the suffrage be limited to freeholders, arguing that the expanding nations would soon abound with mechanics and manufacturers who might sell their votes to their employers and thus create an aristocracy. But Franklin rose in defense of the common people, praised their patriotism during the late war and concluded that the loyalty of the ordinary American sprung from the liberty which he contemplated possessing when delivered from the aristocratic limitations of British institutions. Elseworth urged, in the same vein, that the people would not readily subscribe to the new National Government if it could subject them to disfranchisement. And at the close of the day Gouverneur Morris' proposed amendment was defeated and the convention unanimously adopted the clause proposed by the committee of detail.⁴

From August 7 until the final form of the Constitution emerged there is no more mention of qualifications for electors. The committee on style made a minor change in the clause by dropping the words "shall be the same from time to time."⁵ Thus, the plain means of the words deliberately chosen by the Convention seems to be that article I, section 2, reserves to the States the exclusive right to set qualifications of voters:

"* * * and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

ARTICLE I, SECTION 4

The next portion of the original Constitution dealing with elections is section 4 of article I, the "Times, Places and Manner" clause. Certain notes left from the committee of detail indicate that this clause originated in discussions about the ballot as a mode of voting—most probably in contrast to voting by acclamation.⁶ The point is that nothing in the discussion even hints that the "Manner" of holding elections in any way refers to the subject of qualifications. The debates on the clause on August 8, contain a clear implication that the National Government should be empowered to retain some control over the electoral processes. And with only minor variations in wording, the clause passed through the committee of style.⁷ However, on September 14 a last-minute qualification was added: "except as to the places of choosing Senators"—lest Congress compel the State legislatures to gather at inconvenient or unusual places when selecting United States Senators.⁸

In presenting the new Constitution to the people Madison emphasized that it was incumbent upon the Convention to define such a fundamental article of republican government as the right of suffrage. And he made it quite clear

¹ Ferrand, "The Records of the Federal Convention of 1787," vol. I, 50, 132, 137-138, 358, 860. New Haven, Yale Press, 1911.

² II Ferrand, 139, 137 n. 6, 152 n. 14, 153, 163 n. 17, 164.

³ II Ferrand, 178.

⁴ II Ferrand, 206.

⁵ The committee of style was appointed on Saturday, Sept. 8, "to revise the style of and arrange the articles which had been agreed to by the house." (II Ferrand 547.) Considering the name of the committee, the circumstances in which it was appointed and the actual changes which it made in the text of the Constitution, it seems highly questionable to argue that the committee of style was empowered to make substantive changes in the Constitution itself. For an opposite view of the work of this committee see the testimony of Professor Morrison of Tulane University before the Senate Judiciary Committee on Tuesday, July 30, 1942. (Hearings before the Subcommittee on the Judiciary of the U.S. Senate, 77th Cong., 2d sess., on S. 1280 (poll tax), pp. 226-230). Professor Morrison did not discuss Madison's comments in the *Federalist* nor the records of the committee of detail.

⁶ II Ferrand 137 n. 6, 139, 152 n. 14, 153, 164.

⁷ II Ferrand 567, 592.

⁸ II Ferrand 613.

that the new Constitution did not leave the regulation of this right open to the occasional interference of the Federal Congress but definitively identified the qualifications for national electors with those set by the States for the most numerous branch of their legislatures.⁹

Madison reiterated Wilson's observation in the convention that it was virtually impossible to reduce the different State qualifications to a uniform rule. However, Madison intimated that the Federal constitutional clause adopted only the qualifications set by the State constitutions—not those subject to the vagaries of the State legislatures. Of course, Madison's point was that the people had nothing to fear from the Central Government on the question of voting qualifications since only the States could alter their own constitutions in this regard. Yet, historically, Madison erred in supposing that the State legislatures could not alter the State qualifications without the process of State constitutional amendment because in 1787–88 both Connecticut and Rhode Island were still acting under royal charters and their legislatures possessed plenary power to modify the right of suffrage.¹⁰

Hamilton defended the reserved Federal power of the "Times, Places and Manner" clause on the ground that "*every government ought to contain in itself the means of its own preservation*" [italic in original] and that it would be sheer folly to leave the very existence of the National Government up to the whims of recalcitrant State assemblies which might dissolve the central power by refusing to designate times and places for holding national elections.¹¹ However, in the very next number of the Federalist, Hamilton stated that the National Government has no power to prescribe property or any other qualifications for electors because the Constitution itself defines who may choose or be chosen.¹²

The ratification debates contain very little discussion of qualifications of voters which certainly seem to imply that everyone understood that the newly presented Constitution left this question up to the States. Certainly anything else that the States were thought to be deprived of by the new Constitution was thoroughly debated. The "Times, Places and Manner" clause came in for thorough discussion because of the residual power which it implied in the Federal Government. And several States proposed amendments further limiting this residuum of necessary control.¹³ However, none of these proposed amendments refer to the subject of qualifications.

In Massachusetts, three delegates opposed the "Times, Places and Manner" clause, and Dr. Taylor inquired whether this clause did not confer power upon the Congress to subvert the liberties of the people by "making the qualifications of electors £100 by their power of regulating elections." By such a scheme the Members of the Federal Congress might attempt to keep themselves perpetually in office. But Mr. Rufus King, who was member with Hamilton on the style-drafting committee, replied:

"The idea of the honorable gentleman from Douglass, said he, transcends my understanding; for the power of control given by this section extends to the *manner* of election, not the *qualifications* of the electors. The qualifications are age, and residence, and none can be preferable."¹⁴

In the New York convention, a Mr. Jones moved that the Constitution be amended to permit congressional intervention in elections only when the State legislatures neglected or failed to act. This was actually the more or less standard form of the amendment of this article proposed in the other States. And Jay replied that the Federal Convention actually intended that Congress should act only in such emergency situations.¹⁵

⁹ The Federalist, No. 52 (Madison).

¹⁰ See Story, "Commentaries on the Constitution of the United States," Boston, Little, Brown & Co., 1873, No. 586.

¹¹ The Federalist, No. 59 (Hamilton).

¹² Ibid., No. 60.

¹³ The amendments proposed by the States uniformly stated that Congress should regulate the times, places, and manner of holding elections only when a State neglected or refused to make the regulations necessary for national elections. These amendments may be found in: Documents Illustrative of the Formation of the Union of the American States, Government Printing Office, Washington 1927: Mass. No. 3, p. 1018; South Carolina, p. 1023; New Hampshire, No. 3, p. 1025; Pennsylvania, No. 16, p. 1038; New York, p. 1039; North Carolina, XVII, p. 1050; and Rhode Island, No. 2, p. 1056.

¹⁴ Elliot, "The Debates in the Several State Conventions," vol. II, 49–51. Washington, 1836.

¹⁵ Elliot, Debates, II, 325, 326.

In Virginia, Nicholas was the first speaker to commence explaining the new Constitution to the assembled delegates and his orderly exposition of the text follows the position we have been elucidating.¹⁶ However, the calm deliberateness which Nicholas tried to instill into the proceedings was soon lost, and the arguments began to ramble all over the field. At one point Patrick Henry voiced a plausible objection to the "Times, Places and Manner" clause: that Congress could conceivably designate inconvenient times for the national elections.¹⁷ But in a later, more torrid, speech, Henry argued that the power over "Manner" admits of the most dangerous latitude. Congress could modify elections as they pleased and regulate the number of votes by the quantity of property a man owned et cetera.¹⁸ Lee brushed Henry's objection aside by paraphrasing the language of article I, section 2 on the qualifications of voters. But it fell to Randolph to specifically refute Henry on the point in question. Randolph accused Henry of not proposing a substantial objection to the new Constitution because the State electors were specifically designated as National electors. And Henry's supposition about the power of the rich to control the ballot through nationally imposed qualifications was unwarrantable, unless Henry carried his supposition further and said that Virginia will agree to her own suicide by modifying elections in such manner as to throw them into the hands of the rich.¹⁹

Finally, if any further proof of the meaning of the constitutional clauses is required, it may be adduced from the constitution and/or charters which served as the fundamental law of each of the Thirteen States at the time the Constitution was adopted. The various requirements for exercising the franchise are designated as "qualifications" or "to qualify." Consequently, the meaning of the word "qualifications" in the Federal Constitution is unambiguous because of the clear and distinct meaning which the word had in the State constitutions and charters in force at that time.

The inescapable conclusion is that article I, section 2, even as qualified by article I, section 4, expresses a fundamental constitutional compromise at the very core of the concept of federalism. The constitutional clause in question can only be understood as empowering the States—and the States alone—to set the qualifications for voters in Federal elections.

ARTICLE IV, SECTION 4

The "Republican Form of Government" provision in article IV, section 4, seems to be a latent source of Federal power which might conceivably alter the constitutional compromise explicitized in article I, section 2. The idea for such a clause seems to have originated with Madison, and there is a hint of it in the Virginia plan drafted by Randolph. On June 11, there was some discussion about guaranteeing republican government and the territory of each State, as well as the existing State constitutions and laws.²⁰ However, the Fathers declined to crystallize for all time the existing State territories, institutions, et cetera, and seemed inclined to Randolph's suggestion that the States should be merely prohibited from changing their governments into monarchies.

On July 18, the clause was debated again. Wilson stated that its purpose was merely to secure the States against "dangerous commotions, insurrections, and rebellions." Randolph added that another object was to secure republican government—apparently restating his outlawry-of-monarchy point. Ghorum argued that the General Government might step in only when the political parties in a State appealed to the sword. And Houston wanted to be sure that an inept phrasing of the clause would not perpetuate some of the existing, yet quite inadequate, State constitutions.²¹

The clause unanimously adopted that day was proposed by Wilson and came through the Committee on Style with only minor alterations. It read:

"That a Republican Form of Government shall be guaranteed to each State and that each State shall be protected against foreign and domestic violence."

¹⁶ Elliot, Debates, III, 8.

¹⁷ Elliot, Debates, III, 60.

¹⁸ Ibid. 185.

¹⁹ Ibid. 202, 203. The North Carolina Discussion, which covers the same ground, may be found in Elliot, Debates, IV, 61, 65-67, 71.

²⁰ I Ferrand, 202.

²¹ II Ferrand, 47-50.

Perhaps it is impossible to give specific content to the phrase "Republican Form of Government." Madison gave a sweeping definition of a republic in *The Federalist*,³² arguing that a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior, is a republic. But this is hardly a tight legal definition. In a later number of *The Federalist*,³³ Madison stated that the only restriction which the constitutional clause places upon the States is that they may not exchange republican for antirepublican constitutions.

At least, it seems quite evident that the United States could quickly move to disestablish a monarchy or dictatorship created in any State. But, apart from such an obvious case, the power of the General Government seems to be constitutionally confined to extreme situations. What little light the fragmentary debates in the Convention shed upon this clause is certainly consistent with this view. All of the States had acceptable "Republican Forms of Government" when the Constitution was adopted. And all of those original States restricted the franchise by reason of sex, race, property, residence, or other qualifications. Consequently, it seems that there is little justification for holding that the republican-form-of-government clause was intended to amplify the powers of Congress over State voting qualifications at the time the Constitution was adopted.

The Supreme Court has generally declined to amplify the meaning of this clause, on the general ground that controversies regarding the republican character of the State governments are not justiciable because they involve "political questions."³⁴ However, in rejecting the plea that this clause required that women be given the franchise prior to the 19th amendment, the Court merely pointed to the fact that all State governments were republican when the Constitution was adopted and none permitted women to vote.³⁵

ARTICLE I. SECTION 2, CLAUSE 18

The celebrated elastic clause empowering Congress to make all laws "which shall be necessary and proper for carrying into Execution the foregoing Powers" is not a substantive grant which permits the Congress to escape the limitations imposed upon it by other clauses in the Constitution. Marshall's classic dictum in *McCulloch v. Maryland*: "Let the end be legitimate * * * let it be within the scope of the Constitution * * *," expresses the same idea. Certainly no one could argue that the necessary and proper clause empowers Congress to abolish the Senate or widen the original jurisdiction of the Supreme Court. Nor can this clause empower Congress to establish the qualifications of voters in Federal elections, since this right has been expressly reserved to the States in article I, section 2.

THE 14TH AMENDMENT

Unless the 14th and 15th amendments grant Congress substantive power to establish electoral qualifications the provisions embodied in the original version of the Constitution must be still in force. The complex legislative history of the 14th amendment can, in a sense, be traced back through the Civil War into the morass of argument and strife marked by the Missouri Compromise, the Dred Scott decision, etc. Yet, at the commencement of the postwar era, President Johnson's first annual message to Congress, December 4, 1865, contains an adequate exposition of the traditional constitutional view that the States alone possessed the right to enfranchise the Negro.³⁶

The detailed legislative history of the 14th amendment commences with the formation of the Joint Committee on Reconstruction by resolution of the House on December 4, 1865, and the Senate on December 12 of the same year. One critical force motivating the committee in its deliberations was the fact that the 13th amendment revoked the three-fifths compromise on Negro capitation in article I, section 2, and thus threatened to upset the Republican balance of power in the new Congress with a dozen new seats to be allocated among

³² No. 39.

³³ No. 48.

³⁴ See, *Luther v. Borden*, 48 U.S. (7 Howard) 1 (1849), and the analysis of the doctrine of political questions in *Baker v. Carr*, _____ U.S. _____ (1962).

³⁵ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).

³⁶ Johnson's first annual message, Dec. 4, 1865. Richardson's "Messages and Papers of the Presidents," VI, 358-361.

the former slave States—while the source of this windfall to the South remained disenfranchised. Thus, while the joint committee deliberated, the problem of representation was constantly being debated on the floor.²⁷

The first constitutional amendment which the joint committee devised passed the House but failed in the Senate on March 9, 1866. This proposal provided that "whenever the elective franchise shall be denied or abridged in any State on account of race, creed, or color, all persons of such race, creed, or color shall be excluded from the basis of representation"—which seems to say that if a State denies the franchise to one Negro, no Negroes could be counted as the basis of representation. Opposition to this proposal came from the Democrats, who argued that it was obviously anti-Southern; and the radical Republicans—who felt that this type of amendment could be too easily circumvented by age, property, residence, educational, or other requirements.

On April 30, 1866, Thaddeus Stevens proposed a new resolution of the joint committee in the House.²⁸ The second section of this proposal, dealing with the problem of representation, was explained by Congressman Bingham of Ohio, a member of the joint committee:

"Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. * * * The amendment does not give, as its second section shows, the power to Congress of regulating suffrage in the several States.

"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right of the people of each State to a republican government to choose the Representatives in Congress is of the guarantees of this Constitution, by this amendment a remedy might be given directly for a case supposed by Madison where treason might change a State government from a republican to a despotic government and thereby deny suffrage to the people."²⁹

The House passed this measure, without debate, on May 10, and sent it on to the Senate.³⁰ On May 24, the proposed amendment was taken up in the Senate and Senator Howard, sometimes called the father of the 14th amendment, introduced several changes in the language. However, none of his revisions are pertinent to section 2.³¹ On June 8, Senator Williams proposed an amendment to section 2, which would change the words of the joint committee version passed by the House: "But whenever in any State the elective franchise shall be denied, etc." to:

"But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof is denied. * * *

Senator Howard objected to the Williams amendment because it presented too great an incentive to the States to extend suffrage to the ignorant and uneducated for the mere purpose of acquiring power.³² Moreover, reasoned Senator Howard, we know that the States retain the power which they have always possessed of regulating the right of suffrage because this is the theory of the Constitution itself. This right has never been taken away from them and no endeavor has ever been made to deprive them of this right. In fact, the theory of the whole 14th amendment being proposed is to leave the power of regulating the suffrage with the people or the legislatures of the States and not to assume to regulate it by any clause of the Constitution of the United States.³³

²⁷ Among the numerous acts which the postwar Congress enacted over the feeble veto of the lame-duck President were: 14 Stat. 375: an act providing that Negroes could vote in the District of Columbia; 14 Stat. 379-380: an act providing that in territories thereafter organized the franchise could not be denied on account of race, color, or previous condition of servitude; 14 Stat. 391-392, providing that Nebraska could not be admitted as a State unless the State forbade the denial of the franchise or any other right on account of race or color; 14 Stat. 426: an act regulating the Montana territory and providing that no discrimination on account of race or color would be allowed in the elective franchise within this newly formed territory. However, it is interesting to note that even in the height of its partisan frenzy the radical-Republican Congress did not seriously attempt to enfranchise the Negro by statute alone.

²⁸ "Congressional Globe," 39th Cong., 1st sess., p. 2286.

²⁹ *Ibid.*, 2542.

³⁰ *Ibid.*, 2545.

³¹ *Ibid.*, 2869.

³² *Ibid.*, 3033.

³³ *Ibid.*, 3039.

Despite the eloquent pleas of Senator Howard, the Williams amendment was adopted by the Senate.⁴⁴ In retrospect, however, the central theme in Howard's objection is that the language of the Williams proposal enormously complicates the problem of proportionment of Representatives because the States might choose to make one set of qualifications for electors for Governor, another for judges, etc.

The amended version was returned to the House on June 13 by Thaddeus Stevens. Stevens complained that the second section had received but slight alteration in the Senate and he wished that it contained much more power than it did. However, Stevens was a realist and argued that there was much good in the amendment and further delay might have disastrous consequences.⁴⁵ In any event, the Senate version was adopted by the House and ultimately ratified by the States to become the 14th amendment.

Without question the 2d section of the 14th amendment gives Congress new substantive powers over the States and the States rights to set voter qualifications. Congress now has unrestricted power to diminish the number of Representatives from any State which excludes a portion of its male citizens over 21 years of age from the franchise—regardless of whether that exclusion is accomplished by property, education, or residence requirements. However, this explicit power to reduce a State's representation in the House of Representatives does not imply a Federal power to set uniform rules of voting qualifications, such as sex, education, property, etc., applicable in all States. It seems to be quite clear that the proponents of the 14th amendment had no intention of depriving the States of their historic right to set voting qualifications because they were well aware that "the States would never ratify such an amendment." And the final rejoinder to those who would read a broader Federal power into the 14th amendment is contained in the concerted effort of virtually the same Congressmen and Senators to enact the 15th amendment.⁴⁶

THE 15TH AMENDMENT

The initial, prolonged attempts to enact a substantive grant of power to Congress akin to the 15th amendment ground to a standstill on February 17, 1869, when the Senate refused to concur in the resolution which came from the House and also refused to appoint a committee of conference.⁴⁷ However, scarcely had the Senate vote on the deadlock been counted when the Senate resolved itself into a Committee of the Whole to consider an almost identical amendment (S. Res. No. 8) proposed by Senator Stewart of Nevada.

"The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.

"The Congress shall have power to enforce this article by appropriate legislation."⁴⁸

Senator Howard objected to the language of the Stewart proposal because it conferred by implication, powers which no one wanted the general government to have. Commencing with the addage *Inclusio unius est exclusio alterius*, Howard argued that by forbidding the Congress to restrict the electoral franchise by reason of race, color, etc., the proposed amendment implied that Congress might legitimately set other voting qualifications. What particularly

⁴⁴ *Ibid.*, 3041.

⁴⁵ *Ibid.*, 3148.

⁴⁶ At a later date, Senator John Howard from Michigan stated: "As many of the Senators well know, I served on the Joint Committee on Reconstruction, who reported the 14th amendment to the Constitution to the Senate and to the House of Representatives; and I am not unfamiliar with the object of that amendment. It was discussed at great length before the committee, and by the committee, as well as in the Senate; and I feel constrained to say here now that this is the first time it ever occurred to me that the right to vote was to be derived from the 14th article. I think such a construction cannot be maintained. No such thing was contemplated on the part of the committee which reported the amendment; and if I recollect rightly, nothing to that effect was said in debate in the Senate. * * * The second section goes on to say: 'But when the right to vote * * * is denied to any of the male inhabitants of such State,' etc. * * * Plainly and in the clearest possible terms recognizing the right of each State to regulate the suffrage and to impart or to declare the necessary qualifications of voters for Members of the House of Representatives. * * * Sir, can anything be clearer? Here is a plain, indubitable recognition and admission on the very face and by the very terms of this 14th amendment of the right and power of each State to regulate the qualifications of voters. 'Globe,' 40th Cong., 3d sess., p. 1003, Feb. 8, 1869.

⁴⁷ "Congressional Globe," 40th Cong., 3d sess., 1300.

⁴⁸ *Ibid.*

concerned Senator Howard was that this section empowered Congress to establish a religious test for office, since it merely forbade discrimination of the grounds of race, color, or previous condition of servitude.³⁹

Senator Edmunds replied that the Congress was being given no power—direct or implied—to regulate the qualifications of voters and that Senator Howard's argument was equivalent to saying that a statute which forbade murder implied that every man might commit adultery.⁴⁰ And it seems to be a fair assumption that even the most ardent modern champion of civil rights would not defend the inexorable logic of Senator Howard's position and hold that the 15th amendment, being later in time, repealed by implication both the no religious test section of article VI, and the 1st amendment. Consequently, it seems tenuous to say that the 15th amendment selectively repealed article I, section 2 by implication.

In any event, the version introduced by Senator Stewart passed the Senate and on February 29, 1869, was introduced in the House.⁴¹ The indefatigable Mr. Bingham of Ohio moved to broaden the amendment and proscribe not only race and color qualifications but "nativity, property [and] creed" as well.⁴² He felt that since the amendment would strike down the unjust provisions in the constitutions of Ohio and some 20 other States which discriminated on account of color it might just as well go all the way and delete the property qualification requirement in the constitution of Rhode Island and in the laws of other States. However, he specifically declined to include State educational qualifications because: "I know that the general sense of the American people is so much for education, that chief defense of nations, that if they will not take care of that interest they will take care of nothing."⁴³

The House rejected the Senate version and adopted the Bingham revision of the proposed amendment. Senator Stewart introduced the House version to the Senate on February 23, but the Senate found the House proposal too comprehensive and refused to concur.⁴⁴ A Committee of Conference was formed and in the course of its deliberations the following compromise was achieved: The House agreed to drop the Bingham version and accept the amendment which had passed the Senate on condition that the words "to hold office" be dropped from the Senate version. The compromise measure passed the House⁴⁵ on February 25 and the Senate on February 26. Thus the 15th amendment came to be ratified by the States in its present form.⁴⁶

The congressional debates on the 15th amendment, particularly as they relate to the subject of educational requirements set by the States, clearly indicate that the participants regarded article I, section 2, of the original Constitution as being still in force and meaning what it says: that the States have exclusive power to establish the qualifications of voters in national elections. The amendment was designed to limit the States power in one and in only one particular: the States can no longer deny the franchise for reasons of race, color, or previous condition of servitude. Consequently, the 15th amendment was never intended, directly, indirectly, or by any reasonable implication to empower the Congress to usurp the States constitutional power to establish electoral qualifications.

EARLY SUPREME COURT CASES

The introductory paragraphs of S. 1280 seem to imply that some combination of congressional powers in section 1, article IV, and the last sections of the 14th and 15th amendments—all seasonably blended with the necessary and proper clause—empower Congress to set positive qualifications for voters in Federal elections. This really seems to say that the whole is greater than the sum of its parts. As has already been noted article I, section 8, clause 18, specifically limits the power of Congress "To make all Laws * * * necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States * * *." And since

³⁹ Ibid., 1304.

⁴⁰ Ibid., 1305.

⁴¹ Ibid., 1318.

⁴² Ibid., 1425.

⁴³ Ibid., 1427.

⁴⁴ Ibid., 1481.

⁴⁵ Ibid., 1564.

⁴⁶ Ibid., 1641.

neither the original Constitution, nor the 14th and 15th amendments, empower Congress to establish electoral qualifications in the States, the combination does not alter this basic fact.⁴⁷

The Supreme Court of the United States has never passed directly on the question of Congress power to establish qualifications for voters, but in innumerable dicta the Court has espoused the position we have been elaborating. In *Minor v. Happersett*⁴⁸ the Court explicitly stated that the States are empowered to define the qualifications for voters and rejected the contention that the State exclusion of women from the franchise violated any provision of the Federal Constitution.

Two years later in the case of *United States v. Reese*,⁴⁹ the Court stated that prior to the 15th amendment it was as much within the power of a State to discriminate by reason of race, color, and so forth, as by age, property, or education. "Now it is not"—clearly implying that the States may continue to set other qualifications. *Ex parte Yarbrough*⁵⁰ clarifies a particular aspect of this problem. Here the Court said that the States do not prescribe qualifications for Federal office eo nomine. The States merely define who are to vote for the most numerous branch of their own legislature and the Constitution says that the same persons are entitled to vote for Members of Congress. In other words, it is not the Congress which adopts the State qualifications—implying a power in Congress to reject or modify them—but the Constitution. This view was repeated with emphasis in *Swafford v. Templeton*,⁵¹ which carries us up to the adoption of the 17th amendment.

THE 17TH AMENDMENT

The significance of the 17th amendment lies in the fact that the phrase "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures" uses the identical words of article I, section 2. This is the only instance where a clause in the Constitution is repeated verbatim. Presumably, the clause has the same meaning in both instances.

Senator Borah explained the proposed 17th amendment to the Senate in the following terms:

"The first proposition is that the State alone can determine the qualifications of the voter. The National Government has no power aside from the proposition of preventing discrimination, to interfere with any qualification which the State fixed with reference to the voter. Whenever the State determines who shall vote at an election, if there is no element of discrimination such as is covered by the 15th amendment, Congress cannot interfere with the action of the State. This question is so well established that I need only to call attention to the authorities. The qualification and the status of the voter once being fixed by the State, then his right to cast that vote for Congressman or for

⁴⁷ At the time the 15th amendment was adopted only Connecticut (constitution of 1858) and Massachusetts (amendment of 1857) required educational tests for voters. The constitution of Florida of 1868 provided educational qualifications for new voters after 1880. However, the limitation on the power of Congress over the States' traditional right to specify the qualifications for voters may be more clearly understood in the light of various forms in which the 15th amendment was proposed during the long debate which led up to its adoption. Perhaps the most comprehensive amendment was suggested by Mr. Williams of Oregon: "Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State" (40th Cong., 3d sess., Globe, p. 491). With specific reference to educational requirements, Mr. Boutwell offered: "Nor shall educational attainments or the possession or ownership of property ever be made a test of the right of any citizen to vote." (Globe, 722, 745.) Mr. Wilson's proposed amendment added "nativity, property, education or religious creed" to the race, color or previous condition of servitude formula (Globe, 1014, 1015, 1037-40). Mr. Shellabarger suggested: "No State shall make any law which shall deny or abridge to any male citizen * * * who is of sound mind an equal vote at all elections in the State" (Globe, 639, 722); and Mr. Boutwell proposed that the vote should not be denied or abridged "on account of his want of property or education." (Globe, 726.)

Previous to the 40th Cong., similar amendments outlawing educational requirements had been introduced and rejected. For example, by Senator Dixon of Connecticut (39th Cong., 2d sess., Globe, 1045, 1149). Further details concerning these and other amendments may be found in: Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History," Annual Report of the American Historical Association, 1896, vol. II, pp. 229-235, 219-226, and 247-250.

⁴⁸ 88 U.S. (21 Wall.) 162, 175 (1874).

⁴⁹ 92 U.S. 214 (1876).

⁵⁰ 110 U.S. 651 (1884).

⁵¹ 185 U.S. 487.

Senator, in case this resolution is adopted, is a right dependent upon and guaranteed by the Constitution of the United States.

"This joint resolution provides: The electors in each State shall have the qualifications requisite for electors for the most numerous branch of the State legislature. After the State fixes the qualification and status of the voter, then the right to cast that vote for a U.S. Senator, if this amendment should be adopted and finally become a part of the Constitution, would be a right dependent upon the Constitution of the United States and guaranteed by it, and Congress would have the power to protect and assure any elector the exercise of that right. While the National Government could not in the first instance say who should vote, yet after the State could determine who its voters were, then the National Government can step in and guarantee to everyone whose status has been fixed by the State the right to exercise that franchise; and this may be done by any law which in the wisdom of Congress it deems sufficient to accomplish that purpose."⁵³

LATER SUPREME COURT DECISIONS

Shortly after the ratification of the 17th amendment, the Supreme Court in *Guinn v. United States*⁵⁴ stated that the 15th amendment did not take away from the State governments the power over suffrage which they had been granted under the original Constitution. "In fact, the very command of the amendment [15th] recognizes the possession of the general power by the States, since the amendment seeks to regulate its exercise as to the particular subject with which it deals."

The legislative history of the 19th amendment merely reiterates the same principles we have been expounding—the very fact that the sponsors felt that woman's suffrage could be achieved only by constitutional amendment, not statutory enactment—speaks volumes for the traditional view of the Constitution.

In *Breedlove v. Suttles*⁵⁵ the Court upheld the constitutionality of the poll tax and stated quite emphatically that the States may condition suffrage as they deem appropriate. However, this holding seems to have been considerably qualified by a dictum in *United States v. Classic*:

"While in a loose sense, the right to vote for Representatives in Congress is sometimes spoken of as a right derived from the States [citing cases], this statement is true only in the sense that the States are authorized by the Constitution to legislate on the subject as provided by section 2 of article I, to the extent that Congress has not restricted State action by the exercise of its power to regulate elections under section 4, and its more general power under article I, section 8, clause 18 of the Constitution, 'to make all laws which shall be necessary and proper for carrying into execution the foregoing power.'"⁵⁶

Finally, in *Lassiter v. Northampton County Board of Elections*,⁵⁷ the Court held that a State may, consistently with the 14th and 17th amendments, apply a literacy test to all voters irrespective of race or color. Citing *Guinn* as authority for the proposition that a State has power to set literacy tests, the Court continued: "So while the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic* (313 U.S. 299, 315)."⁵⁸

Thus, the Supreme Court decisions, to date, seem to leave the question unresolved. Lawyers holding that Congress has no constitutional power to set the qualifications of electors can accept the language in *Classic* as qualified by the key phrase in *Lassiter*, "any restriction, that Congress, acting pursuant to its constitutional powers, has imposed." On the other hand attorneys espousing a liberal and dynamic federalism regard *Classic* and *Lassiter* as strong support for their view because these cases imply that Congress has supreme power to do anything "necessary and proper" to solve any problem.

⁵³ Congressional Record, 62d Cong., 1st sess., p. 1890, cf. the remarks by Congressman Hobson, Record, 62d Cong., 2d sess., p. 6359, and Congressman Taggart, ibid. 6359.

⁵⁴ 238 U.S. 347 (1915).

⁵⁵ 302 U.S. 277 (1937).

⁵⁶ 313 U.S. 299, 315 (1941).

⁵⁷ 360 U.S. 45 (1959).

⁵⁸ Ibid.

THE QUESTION OF INSTITUTIONAL COMPETENCE

State voting qualifications could be "unreasonable, arbitrary, and capricious" (e.g., a 30-year residence requirement): or they could be not reasonably related to voting (e.g., only males over 21 who actually engage in armed combat in defense of the United States). In terms of institutional competence the Supreme Court is best qualified to negate such a State requirement because the Court's action is negative and merely strikes down the State qualification without positively inserting a substitute. The obvious source of the Court's power to act in such a case is the Court's duty to interpret the Federal Constitution. For by striking down a State requirement as unreasonable, the Court is merely stating that the Federal Constitution does not empower a State to set unreasonable requirements.

Congress, too, might be thought to share in this negative power which the Court more properly exercises. In a sense, there may be danger that the Court's decision is not final because under article I, section 5, each House is the exclusive judge of the elections, returns, and qualifications of its own Members, and could theoretically seat Representatives elected under an invalid State law, and there would seem to be little that the Court could do about it. However, this possible lack of finality did not deter the Court from striking down the Boswell amendment to the Alabama Constitution in *Davis v. Schnell*.⁸¹ Perhaps our best hope is that mutual respect between the two institutions will never permit such a nightmarish situation to arise.

A slightly different, but closely similar, situation nearly came to pass shortly after the Court sustained the validity of a State poll tax in *Breedlove v. Suttles*.⁸² In 1939, the first anti-poll-tax bill was introduced in the Congress. And at least one theory advanced on behalf of the constitutional power of Congress to enact an anti-poll-tax statute was that the requirement of paying a poll tax was not reasonably related to voting.

The fundamental issue involved here is one of institutional competence. And the question is not merely abstract: whether the Court or Congress is more competent to make decisions regarding the reasonableness—which really means the constitutionality—of State legislation. The much more concrete question is: to which branch of Government does the Constitution entrust this function? For example, Congress might positively interpret the Constitution by stating that "No State shall require more than 2 years residence for eligibility to vote," because Congress would really be saying that anything more than 2 years residence is unreasonable and hence, unconstitutional, i.e. not within the power given the States by article I, section 2.

Applied to the poll tax legislation—and the same reasoning applies to the case of educational qualifications: Once the Court has decided that the levying of a poll tax is within the constitutional power of the States, it seems somewhat anomalous for Congress to outlaw the poll tax upon the supposed premise that such a tax is "not reasonably related to voting." Such a judicial determination by the Congress places the legislative institution in the role of second-guessing the Court, and completely out of the sphere assigned to the legislature by the Constitution. Moreover, even subject to judicial review, it seems highly improper for Congress to make such judicial determinations.

With specific reference to the bills under discussion, Congress has no positive power to declare that a State may not require a knowledge of English as a qualification for voters because Congress cannot constitutionally set the positive qualifications of electors. However, the language of S. 2750 intimates that Congress is assuming a judicial role and declaring that existing State requirements—particularly in New York State—are unreasonable. Subject to review by the Supreme Court, it may conceivably be within Congress' powers to make such a finding. However, a legislative declaration that a State requirement of knowledge of the English language is an unreasonable qualification seems open to serious objection. The Court has traditionally refused to invalidate State legislation as unreasonable, arbitrary and capricious when reasonable men could differ over the question, although a stricter showing of necessity for State action has been required when first amendment freedoms are invaded. The analogy here is that the liberal wing of the Court might be more disposed to vote to uphold the act of Congress on the theory that the exclusion of Spanish-speaking Puerto Ricans deprives them of a fundamental and elemental right and requires a compelling

⁸¹ 81 F. Supp. 872, DCSD Ala. Cert. den. 336 U.S. 933 (1949).

⁸² 302 U.S. 277 (1937).

showing of necessity or reasonableness before the State enactment will be upheld in the face of more liberal Federal legislation.

THE TREATY POWER AND THE SUPREMACY CLAUSE

A somewhat different argument in support of the Spanish-speaking provisions of S. 2750 was suggested by Attorney General Robert F. Kennedy in his testimony before the Judiciary Committee of the House of Representatives on March 15, 1962. The Attorney General referred to the fact that in the Treaty of Paris the United States assumed a special obligation to the citizens of Puerto Rico and that part of that obligation has been fulfilled by granting them full American citizenship. However, he went on to imply that by reason of the Treaty of Paris the United States had an obligation—and presumably a right—to remove the discrimination against Puerto Ricans in the exercise of the elective franchise.

If the analysis of the pertinent sections of the Federal Constitution set out above is accepted it is clear that the Federal Constitution forbids Congress to set the qualifications for voters because this power has been entrusted to the States. The invocation of the treaty power raises a different constitutional problem: whether the constitutional limitations upon the National Government can be circumvented through the use of the treaty power. In *Gregory v. Riggs*⁶⁰ the Court said that the treaty power could not be construed to authorize what the Constitution forbids. However, Justice Holmes in his curious opinion in *Missouri v. Holland*⁶¹ intimated that a different standard exists for judging the scope of the treaty power.

Lest there be any doubt upon this important question it is well to call attention to three things:

First, in *Reid v. Covert*⁶² the Government argued that jurisdiction over crimes committed by civilian dependents of military personnel abroad was authorized pursuant to an executive agreement between the United States and Great Britain. In response, Justice Black wrote: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress or on any other branch of Government which is free from the restraints of the Constitution."

Second, the language of article VI, clause 2: "This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; * * *"—does not mean that treaties need not be made in pursuance of the Constitution. The reason for the peculiar wording of this supremacy clause is that at the time the Constitution was adopted there were some treaties already in existence.

Third, if the peculiar language of the supremacy clause can be construed to permit evasion of the substantive provisions of the Constitution the force of precedent in constitutional litigation provides a compelling warning. If the explicit provisions of the Constitution already discussed can be evaded to foster civil rights legislation, a different administration in other circumstances could quite logically use the same device to circumvent the same Constitution, but in the direction of violating individual rights and liberties. To appeal to the treaty power to override the right of the States to set qualifications for voters would mean the establishment of a precedent potentially capable of destroying the very liberties which it intends to foster.

APPLICATION OF ARTICLE IV, SECTION 4

The present form of S. 2750 does not contain a reference to article IV, section 4 (republican form of government), but a possible argument could be made that Congress derives power to enact legislation regarding voting qualifications from this article. The legislative history of this clause, already noted, indicates that the situation has to be pretty bad before the Federal Government can step in. With relation to the voting shenanigans in the South, the recent reports of the Civil Rights Committee indicate that in some southern counties over 50 percent of the citizens are prevented from voting. Such a general pattern of racial discrimination in the Southern States may produce an oligarchic control of the electoral process, with the result that a hand-picked few are returned to the Federal

⁶⁰ 133 U.S. 258 (1890).

⁶¹ 252 U.S. 416 (1920).

⁶² 354 U.S. 1, 18 (1957).

Congress year after year, wherein they exert a deleterious and disproportionate conservative influence upon national affairs. But it seems highly questionable whether such allegations—even if true—would support an appeal to article IV, section 4.

Of course, the inclusion of the "republican form of government" clause might enforce the Federal Government's position in the sense that if the law is enacted and subsequently challenged by the States, the U.S. attorney could argue that the U.S. courts should decline to exercise jurisdiction to determine the constitutionality of the statute because it deals with a political question. This way the U.S. attorney can have his cake and eat it, too. However, the Court could turn the argument around and refuse to grant an injunction in support of the new law by holding that if this is a political question, it is up to the Congress to enforce the law by refusing to seat the delegates from nonconforming States—or by proportionately reducing the representation of such States.

From what has been said, the inescapable conclusion seems to be that when a State requirement is fair and reasonable on its face, Congress has no specific grant nor implied power from any combination of constitutional clauses to replace a valid State requirement with a substitute of its own choosing. In other words, if the present State statutes and constitutional provisions requiring a knowledge of English as a requirement for voting do not violate the 15th amendment or some other specific provision of the Federal Constitution, then any attempt of Congress to substitute a different qualification is unconstitutional on its face.

DISCRIMINATORY ADMINISTRATION OF LITERACY TESTS

A slightly different situation occurs where a State electoral qualification is fair and reasonable on its face but is administered in a discriminatory manner. In the Georgia case of *Franklin v. Harper*⁴³ the mere possibility of discriminatory administration was held not to render a State statute unconstitutional on the authority of *Monogohela Bridge Co. v. United States*.⁴⁴ However, in the area of race relations, Congress does have explicit power under the 15th amendment to insure the fair and impartial administration of State-set qualifications. One good example of the exercise of this power is the voting referee provision in the recently enacted 42 U.S.C. 1971 (e).

With specific reference to the bills in question, the stipulation that a certificate proving a sixth grade education shall be conclusive evidence of compliance with existing State educational qualifications seems to be the enactment of a rule of evidence and at least plausibly within the power of Congress. However, it seems somewhat less certain that such a certificate would be constitutionally valid as conclusive evidence of compliance with all reasonable State performance tests.

Finally, the basic principle is that Congress has no power to establish an independent qualification or requirement which contravenes State law. If for example, the State of Washington were to enact a law requiring an eighth-grade education in order to exercise the elective franchise, the sixth-grade certificate provision of the proposed bills would be a nullity. If the State requirement is reasonable on its face—Congress has no substantive power to impose a different qualification of its own choosing.

CONCLUSION

1. The provisions of S. 2750 which purport to outlaw the State constitutional and statutory requirements relative to the ability to read and/or write English as a qualification for voting are not within the constitutional power of Congress to enact.

2. The provisions of section 2 of S. 2979 limiting the right of the States to establish qualifications for voters is unconstitutional on its face.

3. A plausible constitutional argument can be made for the validity of the sixth primary grade standard as a rule of evidence in complying with existing State literacy requirements.

⁴³ 205 Ga. 779, appeal dismissed 389 U.S. 946 (1950).

⁴⁴ 216 U.S. 177.

HARVARD UNIVERSITY LAW SCHOOL

CAMBRIDGE, MASS., March 5, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 2, concerning S. 2750 and S. 480. I do not wish to overburden you with my letters, but I write this note to assure you that if your subcommittee, in considering the constitutional aspects of these two bills, find that in my letter of February 26 I fell into obscurity, or overlooked some point, please let me know, and I shall undertake to supply the deficiency.

With every good wish, I am,

Sincerely yours,

ARTHUR E. SUTHERLAND.

CAMBRIDGE, MASS., February 26, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Senate Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of February 12, which enclosed copies of S. 2750 and S. 480, measures which would if enacted substitute completion of the sixth grade in an accredited school, for any other literacy or similar test imposed by State law as a qualification for voting. You ask my opinion concerning the constitutionality of these measures if enacted, and concerning the general question of constitutionality of any act of Congress creating a presumption that completion of the sixth grade itself proves literacy and capacity to exercise the franchise intelligently. I am very pleased to give you my thoughts. To me these measures seem clearly constitutional.

An opinion on a constitutional question is almost always an attempted prediction of Supreme Court action, and I shall try to answer your inquiries in that way. Ever since Chief Justice Marshall's day, most lawyers have considered that Court as the ultimate arbiter of constitutional questions. Of course the Congress and the President have a high duty of their own to act consistently with the Constitution; but presidential statements on constitutionality, and congressional debates on the same object ordinarily turn on past Supreme Court opinions. Thus my response to your inquiries will be based on the relevant clauses of the Constitution, and on my best estimate of how the Supreme Court would decide these questions if they should arise in litigation. I do not here pause to wonder about the form of the case in which these questions might be presented. I take it that your primary interest is substantive rather than procedural.

THE SUPREME COURT'S GENERAL ATTITUDE TOWARD UNCONSTITUTIONALITY SINCE 1936

One starts any constitutional inquiry with recollection that an act of Congress is presumed constitutional. The Congress, as an elected body, expresses popular will in enacted law. The Supreme Court should not and does not lightly hold any Federal statute invalid. Since the close of the year 1936, that Court has held only seven Federal statutes unconstitutional; all seven fell because they conflicted with some explicit constitutional guarantee of individual freedom from arbitrary or unreasonable governmental action. For convenient reference I annex to this letter an analysis of these seven instances.

Not once since the end of 1936 has the Supreme Court held any act of Congress invalid simply because it exceeded the scope of power delegated to the Congress. There have been no successors to *U.S. v. Butler*, 297 U.S. 1 (1936) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) which respectively held the Agricultural Adjustment Act of 1933, and the Bituminous Coal Conservation Act of 1935, invalid on the ground that these statutes exceeded the powers which are granted to the Congress by the commerce clause. The Supreme Court has since that time substantially repudiated both those precedents. If one were to attempt a summary statement of the noteworthy change in the Supreme Court's doctrine which has occurred since 1936 it could be this: that Court has come to acknowledge a much wider extent of the powers delegated to the Congress than it

formerly did. The Court's decisions have shown a striking increase in its conception of the areas which are within congressional control. The Court's few decisions holding unconstitutional acts of Congress since that time all depend on protection of the individual against unreasonable governmental incursions.

THE GENERAL CHARACTER OF THE CONSTITUTIONAL QUESTIONS PRESENTED BY S. 2750
AND S. 480

These proposed measures propose no oppressive or arbitrary governmental action against individuals. S. 2750 and S. 240 ease the way for the citizen to vote despite contrary State measures. Any constitutional questions these two bills may raise go to the extent of Federal power to regulate elections, in a manner conflicting with contrary State requirements. They may thus affect the corporate interests of State governments, but they impose no corresponding hardships on any individual citizen. These statutes belong, in my opinion, to the class which the Supreme Court since 1836 has always upheld; they do not fall into the class of the limited number of Federal enactments which the Court since that year has struck down.

MORE DETAILED ANALYSIS OF S. 2750 AND S. 480

Both of these proposed measures contain congressional findings of fact that demonstrate an existing situation which, so the Congress could find, calls for the legislation. S. 2750 recites, "Congress further finds that many persons have been subject to arbitrary and unreasonable voting restriction on account of their race or color; that literacy tests and other performance examinations have been used extensively to effect arbitrary and unreasonable denials of the right to vote."

S. 480 recites, "The Congress further finds that the right to vote of many persons has been subjected to arbitrary and unreasonable restrictions on account of race or color; that tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color * * *."

S. 2750 proposes a less inclusive coverage than S. 480. S. 2750 would regulate only a "Federal election" defined as, "* * * general, special, or primary election * * * for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate, or Commissioner from the territories or possessions."

On the other hand S. 480 would affect, "* * * any election by the people in any State, territory district, county, city, parish, township, school district municipality, or other territorial subdivision * * *."

Both measures in place of any other literacy or similar test with failure as a ground of exclusion from voting, would substitute completion of the sixth grade in any public school or accredited private school. S. 2750 expressly mentions such schools in any territory and in Puerto Rico; these latter are omitted from S. 480, which specifies only "* * * a school accredited by any State or by the District of Columbia."

Though the two measures vary in phraseology, both would thus substitute, as a criterion of voting, a federally prescribed test in place of any State-prescribed "literacy," "comprehension," "intelligence," or other test of education, knowledge, or understanding. Habitually, voting qualifications have been prescribed by State law, even where the election concerned Federal officers. Certain clauses in the Constitution justify such State criteria if no Federal provision conflicts. Thus under article I, section 2, electors for the members of the House are to "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"; similar language was used in the 17th amendment of 1913 which provided popular election of Senators. Presidential electors are appointed by each State "in such Manner as the Legislature thereof may direct..." Article II, section I, clause 2.

Thus the constitutional questions, presented by the two bills now before us, can be stated this way: are there in the Constitution, including of course the amendments, clauses which despite those just mentioned, would justify the Congress in prescribing a sixth-grade education in place of State literacy, comprehension, etc., tests, where Congress finds these latter to be widely misused? And are there Supreme Court decisions which give any guidance in this matter?

THE CONSTITUTIONAL CLAUSES ON WHICH THESE STATUTES CAN BE SUSTAINED

The most explicit clause is article I, section 4, which provides that, "... the Congress may at any time by Law make or alter such Regulations" * * * as to the * * * "Manner of holding Elections for Senators and Representatives . . .".

However, there is a further reservoir of power in the Congress in the 15th amendment to, "... enforce . . . by appropriate legislation" * * * the "right of citizens of the United States to vote . . ." [despite denial or abridgement] "... by the United States or by any State on account of race, color, or previous condition of servitude."

Likewise there is a source of congressional power in section 5 of the 14th amendment which authorizes the Congress "to enforce, by appropriate legislation * * *" the provisions of that amendment, which include, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Applicable also is the last clause of article I, section 8 of the Constitution which gives the Congress power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

REASON, SUPREME COURT ADJUDICATIONS, AND THE 1961 REPORT OF THE CIVIL RIGHTS COMMISSION, ALL INDICATE THAT S. 2750 AND S. 480 ARE CONSTITUTIONAL.

This question can be approached by stating a hypothetical Federal statute, which should impose civil or criminal liability on any State official who should willfully apply a State "literacy, comprehension, intelligence, or other test of education, knowledge, or understanding" in such a way as "arbitrarily or unreasonably" to deny the right to vote to otherwise qualified persons on account of race or color. Such an act of Congress is clearly *intra vires* the Congress under the 15th and 14th amendment clauses authorizing legislation. The Supreme Court in *Ex Parte Virginia*, 100 U.S. 339 (1880) sustained a Federal indictment of a State judge for violating a Federal statute penalizing exclusion of any man from jury service because of his race. *Lane v. Wilson*, 307 U.S. 268 (1939), and its predecessor *Guinn v. United States*, 238 U.S. 347 (1915), upheld Federal legislation outlawing State statutes which used the grandfather clause as a pretext for excluding Negroes from voting. The opinion of the Supreme Court in the *Lane* case includes this significant language:

"The reach of the 15th amendment against contrivances by a State to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color has been amply expounded by prior decisions. *Guinn v. United States*, 238 U.S. 347, *Myers v. Anderson*, 238 U.S. 368. The amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race * * *."

More recently in *Schnell v. Davis*, 336 U.S. 933 (1949), the Supreme Court affirmed *per curiam* a decision of a three-judge Federal district court enjoining the misuse of a State literacy test in order to exclude otherwise qualified voters on racial grounds. Surely the 15th and 14th amendments authorize the Congress to forbid what they authorize a Federal court to forbid. The supposed statute penalizing misuse of literacy tests on racial grounds in individual cases would be clearly constitutional.

Congressional legislation appears equally constitutional when devised not only to correct such misuse in individually demonstrated cases, but to eliminate the whole system of State literacy tests which Federal courts and the Civil Rights Commission have already found, and which the Congress in the proposed S. 2750 and S. 480 would find are subject to misuse and are actually misused to deny the vote, on racial grounds, to otherwise qualified persons.

The Civil Rights Commission, acting under congressional authority, was recently sustained by the Supreme Court in conducting an investigation of State voting practices which may be used to deny the vote on racial grounds to otherwise qualified voters. *Hannah v. Laroche*, 363 U.S. 420 (1960). That Commission, in 1961, reported:

"9. A common technique of discriminating against would-be voters on racial grounds involves the discriminatory application of legal qualifications for

voters. Among the qualifications used in this fashion are requirements that the voter be able to read and write, that he be able to give a satisfactory interpretation of the Constitution, that he be able to calculate his age to the day, and that he be of good character.

"10. The U.S. Constitution leaves to the State the power to set the qualifications for voters in Federal, as well as State, elections. This power is not, however, unlimited. The 15th amendment prohibits the States from denying the right to vote to any citizen on grounds of race or color, and empowers the Congress to enforce this prohibition by appropriate legislation. Therefore, if Congress found that particular voter qualifications were applied by States in a manner that denied the right to vote on grounds of race, it would appear to have the power under the 15th amendment to enact legislation prohibiting the use of such qualifications. Section 5 of the 14th amendment similarly empowers Congress to enact appropriate legislation to enforce the provisions of that amendment. One of these provisions is section 2 of the 14th amendment, which authorizes Congress to reduce the congressional representation of any State in proportion as citizens of that State are denied the right to vote on any grounds other than age or conviction of crime. The effect of these provisions of the 14th amendment may be to empower Congress to prohibit the use of any voter qualification other than those specified." [Report of the U.S. Commission on Civil Rights, 1961, vol. I, "Voting," p. 137.]

S. 2750 and S. 480 both contain findings of such extensive misuse of "literacy" and similar tests. A State literacy test, fairly administered, would be constitutionally permissible in the absence of such Federal legislation as that proposed. (See *Lassiter v. Northampton County Board*, 360 U.S. 45 (1959).) But if the Congress finds the system of such State tests widely misused for racial reasons, the Congress can substitute its own criterion of literate voting capacity. Congress is not without the power to forbid a system of tests which is subject to demonstrated misuse, solely because in some instances such a test might be fairly used.

Here, at the risk of undue repetition, one must again emphasize the respect which the Supreme Court properly pays to acts of Congress, and the great reluctance with which that Court entertains any suggestion that an act of Congress may be invalid for unconstitutionality. The House of Representatives and the Senate are the popularly elected representative lawmaking agencies of the people of the United States. If either S. 2750 or S. 480 should be passed, the statute would express the considered judgment of those two representative bodies that a federally prescribed sixth-grade completion test should be substituted for any State exclusionary test based on literacy grounds. The Congress would have found that this substitution was necessary and proper for correction of a substantial arbitrary and unreasonable practice, used extensively to deny voting rights on racial grounds.

Instances are not infrequent where the Congress has so proscribed a whole area of State activity, though part may have been used legitimately. Thus, for example, the National Labor Relations Act as construed by the Supreme Court in *Guss v. Utah Labor Board*, 353 U.S. 1 (1957) displaced all similar State labor measures affecting interstate commerce, even where the National Labor Relations Board declined to exercise its jurisdiction and had not ceded jurisdiction to the State. Surely in many instances State labor board activity might here be beneficial and just. Yet, as the congressional will was interpreted by the Supreme Court, Congress had expressed its judgment in favor of uniformity, and the Supreme Court found no difficulty in upholding the Act of Congress, forbidding good and bad State intervention together, in order to achieve an overall Federal goal.

Another example occurs in the field of State income taxation. By act approved September 14, 1959, the States were forbidden to impose any income tax on income derived, under stated circumstances, from interstate commerce. See Public Law 86-272, 73 Stat. 555, 15 U.S.C. 381-384. The legislative history demonstrates the concern of the Congress for the national economy, in view of at least 35 States, the District of Columbia and at least 8 cities taxing such income by statutes or ordinances expressing different formulas. Surely not every such tax can have damaged the national economy; yet the Congress found it necessary to prohibit the entire defined class. A previous tax decision of the Supreme Court, *Northwestern, etc., v. Minnesota*; *Williams v. Stockham Valves*, 358 U.S. 450 (1959), had upheld two such State taxes. Yet the Congress determined to forbid a whole class of such taxation by the act of 1959, even though some instances might be constitutional.

The Congress has acted similarly by restricting States from damming certain watercourses, and, on the other hand, by authorizing Federal licenses to construct dams even where States forbid. See section 23(b) of the Federal Power Act, 16 U.S.C., section 817. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission, State of Iowa, Intervener*, 328 U.S. 152 (1946) the Supreme Court held that Federal licensee might proceed to build a dam despite State opposition. Undoubtedly some State-built dams would be harmless to the national interests; yet the Congress found it necessary and proper to take over the control of all damming of streams affecting interstate commerce. See for the Federal control even of nonnavigable parts of streams under this legislation *Citizens Utilities Co. v. Federal Power Commission*, 279 F. 2d 1 (2d Cir. 1960), certiorari denied 364 U.S. 893 (1960).

The wide sweep of the 15th amendment in protecting the right of citizens of all races to vote was demonstrated by the Supreme Court in *Smith v. Allwright*, 321 U.S. 649 (1944), in *Terry v. Adams*, 354 U.S. 461 (1953), and in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). As the fifth section of that amendment gives the Congress power to enforce the amendment, the congressional power is coextensive with the amendment as interpreted by the Supreme Court. S. 2750 and S. 480 are clearly constitutional.

You ask my further opinion of the general constitutionality of an act of Congress creating a "presumption in law that completion of a sixth-grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently." As S. 2750 and S. 480 are in my opinion constitutional in their present form, any less conclusive effect of such completion would be all the more evidently constitutional. Thus a presumption of literacy, rebuttable by State proof to the contrary, would be clearly within congressional power to enact. A "conclusive presumption," which the State would not be heard to rebut, is the effect of S. 2750 and S. 480. As I said above, I cannot see any possibility that the Supreme Court would hold that the Congress lacks power to enact such legislation.

Sincerely yours,

ARTHUR E. SUTHERLAND.

APPENDIX

ACTS OF CONGRESS HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES, 1937-61, INCLUSIVE

Since the close of the year 1936, the Court has held unconstitutional Federal statutes:

(1) Creating a presumption that, where an ex-convict is in possession of a firearm, he received, shipped, or transported it in interstate commerce. *Tot v. United States*, 319 U.S. 463 (1943).

(2) Prohibiting payment of any salary to three named persons, save for jury duty or military service. *United States v. Lovett*, 328 U.S. 303 (1946).

(3) Penalizing, in self-contradictory terms, one who refuses to allow a Federal officer to inspect a food factory. *United States v. Cardiff*, 344 U.S. 174 (1952).

(4) Providing for separate schools for Negro and white children in the District of Columbia. *Bolling v. Sharpe*, 347 U.S. (1954).

(5) Subjecting a former serviceman to trial by court-martial, after his discharge, for offenses committed while in service. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

(6) Providing for trial by court-martial of dependents of servicemen, stationed overseas, for capital crimes. *Reid v. Covert*; *Kinsella v. Kreuger*, 354 U.S. 1 (1957). In 1960 the Supreme Court extended this holding to include dependents charged with noncapital crimes, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); and civilian employees charged with capital or noncapital offenses. *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*; *Wilson v. Bohlender*, 361 U.S. 281 (1960).

(7) Depriving of U.S. nationality one convicted by court-martial of war-time desertion, and dismissed or dishonorably discharged from the Armed Forces. *Trop v. Dulles*, 356 U.S. 86 (1958).

No other acts of Congress have been held unconstitutional by the Supreme Court during the period January 1, 1937, to the present time.

CAMBRIDGE, MASS., March 27, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Senate Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of March 23, enclosing a copy of S. 2979, which came yesterday. I have read the bill with much interest. It seems constitutional for the same reasons set out in my previous letter to you, dated February 26, which discussed the general constitutional question of congressional power to substitute successful completion of the sixth grade as a demonstration of literacy and understanding, in place of any inconsistent State requirements as to literacy, understanding, and the like. Those general comments apply similarly to congressional power to enact S. 2979.

I have given much thought to the argument that prescription of qualifications requisite for voting in State or Federal elections is reserved to the States, and I can only repeat that the 14th and 15th amendments have modified any such principle which may have existed before 1868 and 1870. It seems clear to me, for example, that a State statute providing in terms that no Negro, or that no person of Mongolian descent, or no person of the American Indian race, could vote in a State election, would be clearly unconstitutional under the 14th and 15th amendments. The Congress would therefore have power to pass legislation inhibiting the enforcement of such a State statute by any means "necessary or proper" within the broad construction which the Supreme Court has attributed to those words. It seems equally clear to me that any State action attempting the same end through more subtle or sophisticated procedures would be equally invalid. The Congress would similarly have power to take necessary and proper steps to inhibit such a sophisticated violation.

What the Supreme Court could do to strike down a discriminatory "grandfather clause" or "literacy test" in *Lane v. Wilson*, 307 U.S. 268 (1939) and in *Schnell v. Davis*, 336 U.S. 933 (1949), the Congress can similarly do. The 14th and 15th amendment clauses which empower the Congress to act, contain no suggestion that power conferred on the Congress by those amendments is narrower than the power they grant to the judiciary. Yesterday the Supreme Court decided *Baker v. Carr*, No. 6, at the October term of 1961; the decision reinforced the construction of the 14th amendment as forbidding State electoral inequalities, and upheld the power of the Congress to provide a statutory remedy.

A fortiori, the power of the Congress to protect Federal elections under article I of the Constitution gives additional congressional authorization where election to Federal office is in question.

The distinguished sponsorship of S. 2979 makes comment on the drafting of this bill a bit presumptuous, but perhaps I may be forgiven a couple of minor suggestions in matters of detail.

In section 2(b)(3) of the bill, one of the grounds under which a State may exclude persons from the franchise is "legal confinement at the time of the election or registration." Clearly this would apply to persons confined to a jail or a penal institution, or confined under court order for mental illness. This does not, however, take care of the unfortunate situation of a mentally incompetent person, who is under a judicial order of guardianship, but who is able to be around without actual confinement. It may be that the statute might be criticized for not adding to subsection 3 a provision for such a case.

I am also somewhat puzzled about the provision of section 4 which refers to "arbitrary inaction" insofar as it may apply to inaction by a private person. This provision applies only to Federal elections, and clearly the Congress has power to protect election to Federal office from any form of unfair restriction, whether imposed by a State official or a purely private person, as section 4 provides. I take it that the provision for "arbitrary inaction" is intended to refer to a situation in which, for example, a State official omits to register, or to provide ballots for, some citizen or citizens of a given race, despite their due request. I find it more difficult to see how "arbitrary inaction," by a private person, having no color or State authorization, could have the effect of preventing anyone from registering or voting. As the case seems unlikely to arise, it may be that the language does no harm. However, as a matter of draftsmanship, might it not be better to restrict the words, "or by arbitrary inaction" to such inaction by one or more public officials, or others acting under color of law? This could be accomplished by making the sentence in section 4(b) read,

"No person, whether acting under color of law or otherwise shall by arbitrary action, and no public officer, Federal or State, or other person acting under color of law shall by arbitrary action or inaction, deny, abridge * * *."

With every good wish, I am,

ARTHUR E. SUTHERLAND.

HASTINGS COLLEGE OF LAW, UNIVERSITY OF CALIFORNIA

SAN FRANCISCO, CALIF., February 28, 1962.

HON. SAM J. ERVIN,
*Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: We have your letter of February 12, 1962, requesting our comments on S. 2750 and S. 480, and, in the paragraph third from the end of your letter on the constitutionality of a statutorily created presumption of literacy.

In our opinion, the provisions of section 2 of article I of the Constitution, and of section 1 of amendment XVII, preempt the field, so far as the qualification of voters for Representative and Senator are concerned. These provisions leave the States free to determine those qualifications, by the process of setting the qualifications of voters for members of the most numerous branch of the State legislature. When the States have done this, in compliance with the 15th amendment as to race, etc., and in compliance with the equal protection provision of the 14th amendment, that would seem to set the qualifications of voters for Representatives and Senators, and leave no room for congressional action. From what we have said, it would follow that a State can set whatever standard of literacy it pleases. It must of course administer its standard in compliance with the constitutional requirements referred to above.

The provision that a sixth grade education in the Spanish language shall qualify a voter infringes, in our opinion, on the constitutional right of the State to determine the qualifications of voters. The 15th amendment does not forbid States from requiring literacy in English as a qualification for voting. And it is hardly conceivable that a requirement of literacy in the official language of a State and of the Nation would be regarded as a denial of the equal protection of the laws to those not literate in that language.

As to qualifications for voting for electors who in turn vote for the President and Vice President, article II of the Constitution, and the 12th amendment, lodge that determination in the States. Congress may not regulate it, except in the enforcement of the 15th amendment and the equal protection provision of the 14th amendment.

As to the validity of the suggested statutory presumption of literacy, mentioned in your letter, it follows from what we have said that such a provision would have no room for application, since the presumed fact is irrelevant to anything which Congress could, under the Constitution, regulate by legislation.

We take note of the proposed findings of Congress that literacy tests for voting are susceptible to misuse and have in fact been misused to accomplish unconstitutional objectives, in regard to the subject here under discussion. In 1957 and 1960 important improvements were made in the enforcement procedures applicable to the existing statutes. There has not been time for an adequate test of the effectiveness of those improved procedures. It may be that they will, to a considerable extent, eliminate the present unconstitutional administration of the present State literacy tests, in the States where such maladministration occurs.

If experience should demonstrate that it is impossible, or largely impossible, to enforce the 15th amendment so long as literacy tests, applied without Federal restrictions, are permitted, we should want to reconsider our position concerning statutes such as the ones submitted for our comment. The 15th amendment is fundamental, and Congress has the power to make it effective. But the proposed legislation seems to us to collide with the constitutional provisions as to eligibility to vote. Those constitutional provisions ought not, in our opinion, to be eroded, except upon a convincing demonstration that adherence to their text and their natural meaning in fact denies to citizens the rights which the 15th amendment guarantees to them.

We appreciate your having given us the opportunity to express our views. Would you be good enough to see that we get three copies of your committee's hearings, when they are printed? We will place one copy in the law school library.

Yours truly,

BROOKS COX,
Professor of Law.
 J. WARREN MADDEN,
Professor of Law.

SAN FRANCISCO, CALIF., April 9, 1962.

HON. SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: We appreciate your giving us an opportunity to comment on S. 2079, which is under consideration by your subcommittee.

May we refer you to our letter of February 28, 1962, in which we commented on S. 2750 and S. 480. Our comments in that letter seem to us to be applicable to S. 2079. Some of the States, at the time of the adoption of the Constitution, and at the time of the adoption of the 14th and 15th amendments, had qualifications for voting other than those permitted by section 2(b) of S. 2079. We think they would still be permitted by the Constitution to have such other requirements, so long as there were none which collided with the 14th and 15th amendments.

Our views as to the literacy tests proposed in section 3 of S. 2079 were expressed in our former letter.

We see no objection to section 4 of S. 2079. This seems to come under Congress' power to supervise elections for Federal officers.

Section 5(a) of S. 2079 would seem to be unobjectionable.

We might add that the use of the word "reasonable" in section 2(b) (1) and (2), lines 24 and 25 of page 2 of the draft, would present troublesome questions of interpretation, if a State imposed requirements in these regards, which were different from those ordinarily imposed.

Yours truly,

BROOKS COX,
Professor of Law.
 J. WARREN MADDEN,
Professor of Law.

LOYOLA UNIVERSITY LAW SCHOOL

CHICAGO, ILL., February 23, 1962.

HON. SENATOR SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights,
Washington, D.C.

DEAR SENATOR ERVIN: I have your letter of February 12 asking the views of constitutional law professors respecting the constitutionality of the provisions of the pending bills, S. 480 and S. 2750.

Your letter states the basic rules which govern this problem of constitutionality. The Constitution contemplates that the States shall retain power to establish voter qualifications. On the other hand no State may deprive any person of the right to vote without due process of law. A State would violate due process if it deprived any person or class of persons of voting rights arbitrarily, or by unjust discrimination, or without some reasonable basis.

Lassiter v. Northampton Election Bd., 360 U.S. 45 (1945), makes it clear that a literacy test for voters would not violate due process provided the test is applied on a nondiscriminatory basis. Congress, however, has found, on persuasive evidence, that, in practice, literacy tests have been used extensively to discriminate unreasonably between Negro and white voters, inasmuch as Negro voters have been subjected to more difficult tests than have the white. Under the circumstances, I believe Congress would be well within its power, under paragraph 5 of the 14th amendment, to implement the due process clause if it prescribed sixth grade education in an accredited English-speaking school as an objective standard of literacy.

S. 2750 goes considerably beyond this. It would also prescribe that sixth grade education, even in a foreign language school (e.g., an accredited Spanish-language school in Puerto Rico), must be accepted as compliance with the language proficiency as well as the literacy test of any State. In effect, this would deny to any State the power to impose proficiency in English as a qualification for voters. If Congress were to enact this provision, I believe it would be usurping the power explicitly reserved to the States to determine the qualifications of electors in their respective elections. I disagree heartily, and any State legislature may fairly and justly disagree, with the recital or implication of S. 2750 that citizens who read, speak, and understand only Spanish are, generally speaking, as well qualified as those proficient in English to exercise the voting franchise. I further disagree with the recitals "that such information as is necessary for the intelligent exercise of the franchise is available through Spanish-language news sources," and "that lack of proficiency in the English language provides no reasonable basis for excluding these citizens from participating in the democratic process." To me, it seems ordinary commonsense that ignorance of the English language would tend to handicap any voter in this country from understanding campaign issues and the qualifications of candidates. The relatively limited Spanish-language news sources cannot be expected to give as broad coverage to campaign issues and candidates as English-language sources. Moreover, a State legislature might reasonably find that campaigners would be unduly burdened if they were under duress to duplicate their broadcasts in Spanish as well as English, and to meet all the challenges posed by Spanish-language publications as well as English.

If a State wishes to enfranchise their foreign-language citizens, regardless of proficiency in English, it would certainly be within their power to do so; but they would not be acting arbitrarily or unjustly if they elected not to do so. Under the Constitution, the States should have the freedom to make their own rules in the matter and Congress should not repress that freedom. The rule that might be best for New Mexico may not be appropriate for Maine or New York.

Respectfully,

RICHARD V. CARPENTER,
Professor of Law.

MICHIGAN UNIVERSITY LAW SCHOOL

ANN ARBOR, MICH., February 26, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: In your letter of February 13 you request my opinion concerning the constitutionality and desirability of two bills, which have been introduced in the Senate, relating to literacy requirements as conditions for voting. One of these is S. 2750, the administration bill, and the other is S. 480, introduced by Senator Javits.

I have had no opportunity to research thoroughly the constitutional questions raised by these measures, but I am familiar with the general area and the basic question of constitutional power involved, and I submit my analysis and comments for what they may be worth.

Both of the proposed bills have one central feature in common, and that is that they are directed against the use of tests, presently used in a number of States, which are designed to test literacy or knowledge and comprehension as a qualification for voting. Each of these bills would in effect, outlaw literacy tests in the case of persons who have not been judged mentally incompetent and who have completed the six primary grades of school education. Or, to put the matter another way, under either of these bills a State could disqualify a person from voting on the basis of a literacy test (as broadly defined by the bills) only if he has failed to complete the sixth grade or has been adjudged mentally incompetent.

There are, however, some differences between the two bills. S. 2750 would be applicable only with respect to voting in Federal elections, whereas S. 480 would be applicable to all elections, whether Federal, State, or local. Under S. 2750, an otherwise qualified voter may not be disqualified from voting on the basis of a literacy test if he has completed the sixth primary grade in either a

public school or an accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico, whereas under S. 480 a similar limitation would be applicable only with respect to persons who have completed the sixth grade at any public school or accredited private school in any State or the District of Columbia. Under S. 480, a person who had completed the six primary grades in Puerto Rico would be subject to a literacy test imposed by State law and would be disqualified if he could not read or write English as required by such law.

Before taking a closer look at the constitutional questions raised by these proposals, consideration must be given to the sources of congressional power to deal with problems relating to qualification of voters.

Under article I of the Constitution the States have the power to prescribe qualifications for electors voting for the most numerous branch of the State legislature and for Representatives in Congress. Likewise, under the 17th amendment, the qualifications of electors to vote for the U.S. Senate are determined by State law. On the other hand, under article I of the Constitution the Congress has the paramount power to make regulations respecting the time, place, and manner of holding congressional elections.

It seems clear from opinions of the Supreme Court that the congressional power over Federal elections is not limited to the regulation of the time, place, and manner of elections. It extends to the entire electoral process in respect to Federal officers. Moreover, the Supreme Court has held that the right to vote for Representatives and Senators is a federally created right, stemming directly from the Constitution and Congress, therefore, has the implied power to safeguard the exercise of this right. Nevertheless, the Constitution does also make clear that the qualification of electors is determined by State law, and in view of this explicit constitutional provision, it must be concluded that the breadth of the congressional power over Federal elections does not include power to override State-prescribed qualifications or to substitute federally prescribed qualifications in their place. The Supreme Court decision sustains an assertion of congressional power.

If what a State requires by way of voting eligibility is not really a qualification within the sense of the Constitution, but goes to another matter which is subject to the paramount Federal control over the electoral process in respect to Federal officers or interferes with the federally created right to vote, it is subject to congressional control and regulations. Likewise, if a State-imposed qualification violates the express prohibitions of the 15th and 19th amendments or otherwise arbitrarily discriminates in classifying persons eligible to vote in violation of the equal protection clause of the 14th amendment, it ceases to have any validity as a qualification, and Congress may act in an appropriate way to enforce the right to vote free from such a qualification, and in this case, it is not limited to protecting the right to vote in Federal elections, since the 14th, 15th and 19th amendments operate to invalidate any restrictions on the right to vote, whether in Federal or State elections, which violate the limitations imposed by these amendments.

Turning to the questions raised by literacy tests required by State law as a condition to voting, it seems clear that proof of literacy as a condition to registration for voting is appropriately characterized as a qualification within a State's power to impose under the authority reserved to the States under article I. It seems to me that this question was put to rest by the Supreme Court's decision in *Lassiter v. Northampton Election Board* (360 U.S. 45), where the Court held that the imposition of a literacy test by the State of North Carolina came within the State's power to prescribe qualifications, and that absent any showing that the test was applied in an arbitrary or discriminatory way, such a qualification did not violate the 14th amendment.

As I understand the holding in *Lassiter*, it means that a literacy test goes to the matter of qualification over which States have control under article I (and also the 17th amendment) and that such a qualification, as long as it is not unreasonable or discriminatory on its face, does not violate the 14th amendment. In view of this I fail to see how Congress has any authority under its article I powers to legislate against State-imposed literacy tests in their application to Federal elections.

On the other hand, it seems clear also that the *Lassiter* case does not resolve all the questions raised by the proposed Federal legislation. In *Lassiter* the Court was dealing with the literacy test imposed by the State of North Carolina. The Court's holding in effect was that the test imposed by North Carolina law

was not invalid on its face. In short, a literacy test as such comes within a State's power to prescribe qualifications and is not constitutionally subject to attack unless because of features that make it unreasonable or discriminatory on its face or because it is administered in a discriminatory way.

A State-imposed qualification, valid on its face, become invalid if administered or enforced in a discriminatory way so as to violate either the equal protection requirement of the 14th amendment or the explicit requirement of the 15th amendment that the right to vote shall not be abridged because of race or color, or of the 19th amendment forbidding abridgement of the right to vote because of sex.

This brings us then to what I regard as the possible constitutional basis of Federal legislation outlawing the use of literacy tests as the ground for disqualification of persons who have completed the sixth grade in school and who are otherwise qualified to vote. Congress has the power to enforce the 14th, 15th, and 19th amendments, and at this point we may concentrate particularly on the 14th and 15th amendments since it appears that the chief objection to the literacy test is that it is used as a means of discriminating against Negroes. Although the congressional power to enforce the 14th and 15th amendments is not to be confused with the Supreme Court's power to interpret the meaning of these amendments, it is nevertheless true that the enforcement power is a broad one and that pursuant to it Congress may employ appropriate measures to end State-sanctioned practices that result in discrimination in the exercise of the voting right on the basis of race or color. Recent Federal civil rights legislation attests to the breadth of this power.

In view of the *Lassiter* holding that a literacy test properly serves a qualification purpose and is not invalid unless unreasonable or discriminatory on its face or in its application, the only ground for congressional intervention aimed at outlawing such tests is a finding and determination by Congress that these tests are subjective in nature and lend themselves to a practice of administrative discrimination, that they are administered in a discriminatory way and that the only effective remedy for dealing with these discriminatory practices is to prohibit the use of these tests altogether, at least as to persons who have completed the sixth grade in school.

Such a theory of congressional power to deal with this question would extend this power further than has been recognized to date, and would require a very liberal interpretation of the power to enforce the 14th and 15th amendments. To authorize Federal courts to enjoin enforcement of literacy tests in a given community when shown to be administered in a discriminatory way or to enjoin election officers from discriminatory enforcement of these tests or to require the registration of a person who has been disqualified because of discriminatory enforcement of such a test are all remedies that would be appropriate to meet proven discriminatory application of literacy tests. It is quite another matter, however, to outlaw all literacy tests in all States as a means of coping with the problem of discriminatory enforcement in some areas.

As stated above, such a drastic remedy to meet the problem of discriminatory enforcement must rest on findings by Congress that these tests lend themselves to discriminatory application, that, in fact, they are frequently used in a discriminatory way and that the only practical solution to the problem of discrimination resulting from these tests is to eliminate them altogether. Since literacy tests usually afford some discretion to the local officials conducting the test and in some cases are of a character that admit wide discretion in their application and grading, it would not be difficult to establish the proposition that these tests by their nature lend themselves to discriminatory application. Furthermore, evidence is available through the reports of the Civil Rights Commission and other sources, that, at least in some areas, these tests are administered in such a way as to discriminate against Negroes. Whether to correct this situation it is necessary to outlaw these tests in all States, including States where no charge of discriminatory application can be sustained, is the critical question. Certainly Congress could stop short of such a drastic remedy by confining relief to situations and areas where discriminatory use is made of these tests. Or, Congress in the alternative could prohibit the use of tests which place substantial administrative discretion in local officials.

Actually the proposed legislation does not prohibit the use of literacy tests altogether. It prohibits their use to disqualify persons who have completed the sixth grade of school. I am not clear, however, that this contributes to strengthen the proposed legislation so far as constitutionality is concerned. Indeed, this feature raises new problems. The very fact that Congress would

substitute a sixth grade education as the substitute for a literacy test is an indication that some standard for determining literacy or intellectual competence is appropriately a matter of voter qualification, a matter reserved to the States under the Constitution. Since this is a matter of qualification I fail to find a source of power in Congress to prescribe a specific qualification as being adequate, namely, completion of the sixth grade in school. Whatever power Congress may have to outlaw State discriminatory practices in the enforcement of voter qualifications, it is difficult to see how this can be a source of positive power to prescribe what Congress thinks is a proper qualification for the States that wish to impose some kind of literacy requirement or standard. If a State were to determine that a seventh- or eight-grade education is necessary as a qualification for voting, the State law should govern unless it could be said to be arbitrary or unreasonable. What the proposed legislation is directed against is the type of literacy test that cannot be objectively determined. If this is the case, the desired result can be achieved by prohibiting literacy tests that are not capable of objective determination but then leaving to the States the choice of an appropriate objective standard, such as completion of a minimum period of education or the taking of a test that can be graded objectively.

As indicated above, I think the proposed legislation presents serious and substantial questions of constitutionality. It prescribes a drastic remedy at the expense of State power to prescribe a type of qualification which the Supreme Court has recognized as valid. Nevertheless, it would be hazardous to predict that the Supreme Court would find such legislation unconstitutional. The Court, in recent years, has evidenced a reluctance to hold acts of Congress unconstitutional. The validity of any legislation resting on factual findings by Congress, that literacy tests other than those measured by number of school grades completed tend to result in discriminatory practices, would be aided by the presumption of constitutionality. Moreover, the Court is ready to recognize a broad discretionary power in Congress to choose the means it deems proper for dealing with a problem within the area of its concern. Finally, the fact that Negroes appear to be the chief victims of discriminatory administration of literacy tests might well be an important factor in predisposing the Supreme Court to resolve doubts in favor of such legislation, in view of the strong stand the Court has consistently taken in recent years against laws and practices that result in racial discrimination.

The discussion above does not take account of the differences between S. 2750 and S. 480. The former applies only to Federal elections whereas the latter is applicable to all elections. Since it appears that the only theory to sustain this kind of legislation is that Congress is exercising its power to enforce the 14th and 15th amendments and not a power it has under article I. I see no reason why this legislation, if a valid exercise of congressional power under these two amendments, would have to be limited to Federal elections, although Congress, because of its paramount concern with Federal elections could presumably limit such legislation to Federal elections, if it chose to do so. It would seem incongruous, however, for Congress to find that literacy tests present a problem of discrimination and then outlaw them only in respect to Federal elections.

The other difference between the two bills is that in recognition of completion of the sixth grade of education as the appropriate standard, S. 2750 would give credit to six grades completed in any State, territory, the District of Columbia, or the Commonwealth of Puerto Rico whereas S. 480 would give credit only to completion of six grades in any school in any State or the District of Columbia. S. 2750 is aimed at permitting citizens who have had their education in Puerto Rico to vote even though they cannot pass an English literacy test. It does not appear that this raises any additional constitutional issue, except as it helps to point up the extraordinary character of the proposed legislation in interfering with a State's power to prescribe qualifications. Certainly a requirement that a person read and understand English as a condition of voting cannot in itself be considered unreasonable or unlawfully discriminatory under the 14th amendment.

In your letter you ask my opinion on the related question of constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently. If by presumption in law is meant that Congress by law is substituting its own kind of standard to serve as the equivalent of a literacy test in furnishing proof of necessary intellectual qualification for voting, this raises the same problem as discussed above in connection with the two bills under consideration. Whether

called a presumption of law or not, Congress is in effect either prescribing a qualification or saying what should be sufficient to satisfy the purposes of a State qualification which takes the form of a literacy test. In either case Congress is prescribing a positive type of qualification, rather than prohibiting qualifications that lend themselves to discriminatory application, and this strikes me as raising a serious question of interference with a legitimate area of State power and law for the reason stated in the earlier discussion.

I conclude with a few words regarding the desirability of legislation of the kind proposed. It seems to me that literacy tests have a proper place in determination of qualification of voters so long as they are not arbitrary or unreasonable. On the other hand, discriminatory administration of such tests aimed at a particular racial group should not be permitted consistent with the 14th and 15th amendments. The real source of the difficulty is that literacy tests usually permit those administering them to exercise substantial discretionary power, and thus they lend themselves to discriminatory application. In dealing with this kind of discrimination I should prefer that Congress, before outlawing literacy tests and substituting its own objective standard, first explore other more limited ways of dealing with the problem by giving Federal courts power to prescribe effective remedies in situations where discriminatory use of these tests is established. Only if other more limited remedies are shown to be impracticable would Congress be justified in restricting a State's power to impose valid qualifications by completely banning the use of literacy tests. But even then Congress should go no further than to prohibit types of literacy tests or standards which are not capable of objective determination, since the choice of tests within this limit should be a matter for State and not congressional determination in view of the constitutional provision which leaves with the States the power to prescribe qualifications.

Sincerely yours,

PAUL G. KAUPER.

(You are authorized to insert this expression of my views in the printed record.)

ANN ARBOR, MICH., April 4, 1962.

HON. SAM J. ERVIN, JR.,
*Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary, U.S. Senate,
Washington, D.C.*

DEAR SENATOR ERVIN: I regret that because of absence from my office I have been delayed in responding to your letter of March 23 in which you requested my comments on S. 2979, a copy of which was enclosed in your letter. S. 2979, like S. 480 and S. 2750 which I discussed in my earlier letter to you of February 26, pertains to voter qualifications, and is in large measure directed to the literacy test problem.

As I stated in my letter of February 26, it seems to me that the only possible basis for congressional action in outlawing the use of literacy tests as a form of voter qualification is that they are applied in a discriminatory way to deny the right to vote, that such discrimination violates the 14th and 15th amendments, and that in the judgment of Congress the only way to deal with the problem, in the exercise of the congressional power to enforce these amendments, is to outlaw the test or provide a congressional substitute deemed to satisfy the purpose of a literacy test. In my letter I expressed doubt as to the power of Congress to go this far in interfering with a State's power to prescribe qualifications.

Section 2(a) of S. 2979 states the theory of congressional power resting on the 14th and 15th amendments to deal with the matter of qualifications, namely, to prevent the use of qualifications as a means of denying the right to vote because of race or color. But in section 2(b) the proposed bill purports to define, subject to section 3 in respect to literacy tests, what are permissible qualifications the States may impose. The difficulty I have with this is that whereas the power of the States to define qualifications is derived from and recognized by the Constitution, subject to limitations imposed by the Constitution in the 14th, 15th and 19th amendments, the theory of section 2(b) of S. 2979 is that Congress by virtue of its power to enforce the 14th and 15th amendments has an implied legislative power to determine what qualifications the States may impose. While Congress has a power to deal with qualifications and abuse in their administration in order to prevent discrimination, I fail to find in this a positive source to prescribe what qualifications a State may impose.

Section 3 deals specifically with literacy tests and states the general principle that successful completion of six or more grades of formal education shall satisfy all the requirements of any such test. It appears to me that this attempt to deal with the literacy test problem is subject to the same criticism, in terms of the constitutional power of Congress, as expressed in my earlier letter respecting S. 480 and S. 2750, namely, whether the power of Congress to act so as to enforce freedom from discrimination on the basis of race or color in exercise of the voting right, extends so far as to warrant this drastic interference with the power of a State, as recognized by the Supreme Court in the *Lassiter* case, to require a literacy test as a qualification for voting. I fail to see how a congressional statement that the successful completion of six or more grades of formal education shall satisfy all the requirements of any such test adds to the constitutional strength of the attempt to deal with the literacy test problem by substituting a fixed objective standard prescribed by Federal law in place of the State-prescribed test. Indeed, it seems to me that the theory of section 3 of S. 2979 is possibly even a weaker one than that stated in S. 480 and S. 2750, since section 3 rests on the very dubious, and in my mind untenable, theory that Congress has an authoritative power to interpret and determine the meaning of State law.

In short, I think that the general considerations advanced in my earlier letter respecting S. 480 and S. 2750 apply with equal if not greater force to section 3 of S. 2979 as a way of dealing with the literacy test problem.

In concluding may I gratuitously express a thought occasioned by the proposal for a constitutional amendment to outlaw the poll tax as a qualification for voting. I find it somewhat anomalous that while it is recognized apparently that a constitutional amendment is required to displace a State's power to prescribe payment of the poll tax as a qualification, the proponents of the literacy test bills believe that Congress has the power, unaided by constitutional amendment, to control a State's power to prescribe a literacy test as a voting qualification. I fail to see such substantial differences between the two types of qualifications as to warrant such different conclusions on the question of constitutional power in Congress to deal with these matters.

Sincerely yours,

PAUL G. KAUPER.

NEBRASKA UNIVERSITY COLLEGE OF LAW

LINCOLN, NEBR., March 20, 1962.

Senator SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Transmitted herewith are notes on congressional power to establish voter qualifications, in response to your letter of February 13. I hope this may be included in the printed record of the hearings now being held on these bills, and would appreciate receiving two copies of the record in which it appears.

I hope this material is of value, and appreciate the opportunity to be heard on such important issues.

Sincerely,

JOHN M. GRADWOHL,
Associate Professor of Law.

NOTES ON CONGRESSIONAL POWER TO ESTABLISH VOTER QUALIFICATIONS

The constitutional power of Congress to legislate with respect to voter qualifications has been raised by bills now before the Senate Subcommittee on Constitutional Rights. Proponents of the bills have asserted that Federal power exists by virtue of congressional authority to regulate the times, places, and manner of holding Federal elections and the antidiscrimination provisions of the 14th and 15th amendments.

In our opinion, the power of Congress to establish voter qualifications is remedial only. The plenary power to fix the qualifications for voters in both State and Federal elections has constitutionally and traditionally rested with the States. Congress has no general power under the Constitution to establish voter standards.

Article I, section 4, provides a limited congressional authority to make or alter State provisions relating to the times, places, and manner of holding con-

gressional elections. Inferentially, article II, section 1, would seem to deny this same power concerning presidential elections. This power concerning times, places, and manner, together with the general authority of the "necessary and proper" clause, should not be construed as a substantive grant of authority to Congress to fix the qualifications of voters which has been specifically left by article I, section 2, the 17th amendment, and article II, section 1, to the States.

On the other hand, it is clear that Congress has remedial power under the 14th amendment, section 5, and the 15th amendment, section 2, to curb State voting activities which violate the provisions of the 14th or 15th amendments. This power comes into being and exists only insofar as States have infringed, or threatened to infringe, upon the rights protected under the amendments.

1. THE BILLS

The principal bills due to receive subcommittee consideration state that literacy tests may not be used to prevent a person otherwise qualified to vote from being allowed to vote. There are substantial differences between these bills:

(a) S. 2750, the administration bill (introduced by Senator Mansfield and Senator Dirksen), pertains only to Federal elections. S. 480, the Javits bill (introduced by Senator Javits and 12 other Senators), applies to all elections, Federal, State, or local.

(b) The administration bill is based upon findings and purposes dealing with both racial discrimination and ability to read and write English. The legislation would override State voter requirements of ability to read and write in the English language for persons completing the sixth grade of any public school or accredited private school in any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico. The purpose is to allow certain Spanish-speaking persons to vote. The bill relates to performance in any examination, whether for literacy or otherwise.

Senator Javits' bill deals solely with literacy tests. The bill covers only persons completing the sixth grade in an accredited school in any State or the District of Columbia. It relates only to any requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge or understanding, thereby leaving in effect State English language requirements.

(c) The administration bill amends subsection (b) of 42 U.S.C. 1971 covering coercion and intimidation in Federal elections. The original subsection, as well as the proposed amendment, relies in part upon congressional power to protect the Federal electoral process under article I of the Constitution in addition to the 14th and 15th amendments. It is necessary for the administration bill to utilize a claim of plenary power of Congress because there has been no finding that the English language requirement has been used to discriminate on the basis of race, color, or previous condition of servitude within the 15th amendment and the Supreme Court has held that a State English language requirement does not violate 14th amendment rights.

In dealing solely with the literacy tests which have been utilized for purposes of racial discrimination, Senator Javits' bill amends subsection (a) of 42 U.S.C. 1471, and may rely exclusively upon section 2 of the 15th amendment and section 5 of the 14th amendment.

2. CONGRESSIONAL AUTHORITY UNDER ARTICLE I

It has been understood from the beginning of the country that the States have a basic power to set voter qualifications applicable to both State and Federal elections.

Article I, section 2, and the 17th amendment provide that in elections of Senators and Representatives "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Article II, section 1, states that presidential electors shall be appointed "in such Manner as the Legislature thereof may direct."

It is significant that the Constitution, itself, places the power to fix voter qualifications in the States. Where the constitutional drafters contemplated congressional action, the Constitution provides in article I, section 4:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Thus, the matters of time, place and manner of holding the elections of Senators and Representatives were distinct from these provisions concerning voter qualifications. And article I, section 4, does not apply to presidential elections.

Voting has long been considered a Federal constitutional right which may not be interfered with by States. The cases which have established and applied this rule have, however, carefully explained that this right is restricted to persons qualified to vote under State law. Thus, in *United States v. Classic*, 313 U.S. 299, 315 (1941), the Court said:

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a State to cast their ballots and have them counted at congressional elections."

Article I, section 4, and the "necessary and proper" clause of article I, section 8, gives Congress authority to protect the integrity of Federal elections. This power sustains, for example, Federal corrupt practices legislation. But this authority of Congress is not a plenary power to fix voter qualifications. It should not be broadly construed to limit the provisions placing these powers with another agency of government, the States.

3. CONGRESSIONAL AUTHORITY UNDER THE 14TH AND 15TH AMENDMENTS

The application of the 14th and 15th amendments to congressional authority concerning voter qualifications must be considered in two phases. These amendments have a self-operating effect which, by itself, precludes some discriminatory State action. Congressional authority under the amendment is limited to devices appropriate to correct discriminatory actions. The amendments do not constitute a grant of authority to Congress to legislate generally on the subject of voter qualifications.

1. Self-operation of amendments

It seems clear that the States may impose a literacy test as a requirement for voter qualification. *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959); *Guinn v. United States*, 238 U.S. 347 (1915); *Williams v. Mississippi*, 170 U.S. 213 (1898). States have also been held to be entitled to use requirements of residence (including a declaration of intent to establish residence), registration, age, fluency in the English language, citizenship, sanity, payment of a poll tax, and absence of a criminal record and an oath that the voter does not belong to an order which advises a disregard of the criminal law. *Lassiter v. Northampton Election Board*, *supra*; *Breedlove v. Scuttlles*, 302 U.S. 277 (1937); *Pope v. Williams*, 193 U.S. 621 (1904); *Mason v. Missouri*, 179 U.S. 328 (1900); *Davis v. Beason*, 133 U.S. 333 (1890).

These cases, and many others, also make it clear, however, that the ability of States to fix voter qualifications may not be exercised in a way which violates personal rights protected under the Constitution against State interference. In the *Lassiter* decision, the opinion carefully specifies that the Court did not pass upon the question of discriminatory application of a literacy test. 360 U.S. at 50. The case involved an applicant for registration who had refused to submit to the test and made no allegation that the statute had been applied discriminatorily. The Court distinguished an earlier decision that requiring a voter to understand and explain the Constitution indicated on its face a device to perpetuate racial discrimination. 360 U.S. at 53. Similarly, although the right of States to fix boundaries of its cities is unquestioned, the power cannot be used to deprive Negroes of a right to vote. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

2. Congressional authority

Section 5 of the 14th amendment and section 2 of the 15th amendment provide that Congress shall have power to enforce the amendment by appropriate legislation.

(a) *Fifteenth amendment*.—The purpose of the 15th amendment was to give colored persons a right to vote. In form, the amendment states that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The new constitutional right created by this language has been stated to be "an exemption from discrimination in the exercise of the executive franchise on account of race, color, or previous condition of servitude." *Ex Parte Yarbrough*, 110 U.S. 651, 665 (1884); *United States v. Cruikshank*, 92 U.S. 542, 555-556 (1875); *United States v. Reese*, 92 U.S. 214, 217-218 (1875).

The virtually overwhelming evidence today indicates that State literacy tests have been used primarily by some States to discriminate on the basis of race or color. If the proposed statute is supported by these legislative findings, Congress can provide that a sixth-grade education is sufficient literacy, or a presumption of sufficient literacy, under a State voter qualification test. To this extent, the proposed congressional legislation seems well within the phrase "appropriate legislation." See *United States v. Ruines*, 302 U.S. 17 (1930). This legislation is in essence no broader than might be judicial findings and decrees in the areas affected by the legislation. Congressional power in this instance is at least as extensive as the power of the judiciary. See *Gomillion v. Lightfoot*, *supra*. Further, congressional authority is not limited to procedural enforcement of the self-executing provisions of the amendments. Having authority to act with respect to State abridgements of rights protected under the amendment, Congress may enact legislation reasonably directed to alleviate the abusive State action. On this basis, the constitutionality of the sixth-grade education provisions is virtually assured.

The scope of the 15th amendment is limited to discrimination on the grounds of race, color, or previous condition of servitude. Absent a showing that State requirements such as use of the English language or property ownership have been employed to discriminate along racial lines, Congress is not authorized to legislate on these subjects under the 15th amendment.

(b) *Fourteenth amendment*.—Congressional authority to enforce the provisions of the 14th amendment turns primarily upon rules best stated in the following language of the *Civil Rights Cases*, 109 U.S. 3, 11-12, 13-14, 18 (1883):

"* * * [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the 14th amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

"* * * Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. * * *

"Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject,

accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, and so forth. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers."

The 14th amendment, like the 15th, would sustain Federal legislation eliminating State voter qualifications used to discriminate against colored persons. Discriminatory application of an otherwise valid State law may be held to violate the "equal protection clause." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). If the discrimination is on the basis of race or color and to affect voting rights, both the "equal protection clause" and the 15th amendment are applicable.

Congress does not have a general authority to establish voter standards in order to assure equal protection of the laws. In only those situations where there is a denial of the elective franchise to persons reasonably qualified to vote does congressional authority to legislate on voter qualifications come into existence.

It is possible that State property ownership requirements, despite their historical basis, might be held to involve a denial of equal protection on the basis that State voter laws cannot differentiate between the rich and the poor. Cf. *Griffin v. Illinois*, 351 U.S. 12 (1956). Disqualification from voting for conviction of minor misdemeanors or bad character (see 1, 1961 U.S. Commission on Civil Rights Report, 68-70) might constitute a denial of equal protection or due process or a cruel and unusual punishment.

It is highly unlikely, however, that the authority of the 14th amendment can sustain congressional action removing State English language requirements. These requirements have been held valid in recent decisions. *Lassiter v. Northampton Election Board*, *supra*; *Comacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961). To date, there has been no showing that the English language requirement has been improperly applied. The Civil Rights Commission did not investigate the few complaints submitted to it on this ground.

For practical purposes, Congress is not safe in assuming that the State requirements now on the books would be held to deny equal protection of the laws without a showing of discriminatory application. Until there is a finding of State action which violates the 14th amendment, Congress does not have authority under the amendment to establish voter standards, and the States retain their traditional exclusive control over voter qualifications applicable to both State and Federal elections.

4. RECOMMENDATION

There are several advantages to a proposal such as Senator Javits' bill which is remedial in nature over the administration proposal which attempts to exercise a congressional plenary power over Federal elections.

Admittedly, the administration bill can reach only Federal elections, while Senator Javits' bill applies to State and local elections as well. The average citizen whose rights are now limited by discriminatory practices is vitally affected on a day-to-day basis by elected State and local officials as well as the actions of Federal officials.

The remedial legislation is virtually certain to be held constitutional under the 15th amendment, section 2, and the 14th amendment, section 5. The administration bill raises a number of serious constitutional questions and is apt to be held unconstitutional insofar as it asserts a general Federal power to fix voter qualifications. The claim of a plenary power over the elections of Senators and Representatives is doubtful and probably unsupportable in the case of presidential elections.

The proposed finding that " * * * lack of proficiency in the English language provides no reasonable basis for excluding these (Spanish-speaking citizens) from participating in the democratic process" contained in the administration bill seems directly opposed to the past court decisions.

If the doubtful claim of congressional power to establish voter qualifications is to be asserted, it would seem to be more valuable to establish a comprehensive set of Federal requirements. For example, in terms of sheer numbers, it is likely that except for the literacy requirement, more persons were disenfranchised by residence requirements of the various States from voting in the last presidential election than from the other causes attempted to be remedied by the proposed Federal legislation.

Respectfully submitted.

JOHN M. GRADWOHL,
Associate Professor of Law.
WALLACE M. RUDOLPH,
Assistant Professor of Law.

LINCOLN, NEBR., April 11, 1962.

Re S. 2079; voter qualifications.

Senator SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of April 5, and for sending the copy of S. 2079. This letter supplements our original statement on congressional power to establish voter qualifications, dated March 20, 1962.

Our general conclusion with respect to S. 2079 is that the bill is constitutionally drawn on its face. The basis for this conclusion is that S. 2079 is remedial only in that it attempts to outlaw voting requirements that "are susceptible of use, and have been used, to deny citizens the right to vote because of their race or color."

The bill does not invoke an asserted plenary power of Congress which we believe to be a constitutional defect of the administration bill. To successfully attack S. 2079 in the courts, it would be necessary to show that these findings are contrary to fact. The attack could be successful as the bill finds that any qualifications other than those stated in it may be used and have been used discriminatorily. If legitimate voter qualifications (other than those allowed by the bill) exist and could be employed without discrimination then a basis for constitutional attack exists.

A. The findings in section 2(a)(1) of the bill state that qualifications other than age, residence, incarceration, and conviction of a crime "are susceptible of use, and have been used, to deny citizens the right to vote, because of their race or color."

(1) These findings would appear to sustain the constitutionality of congressional action under section 5 of the 14th amendment and section 2 of the 15th amendment. This authority of Congress is remedial only to correct State abuses in violation of the amendments. If the findings are correct as stated, then there have been deprivations of 14th and 15th amendment rights by the States of a sufficiently substantial degree to invoke the congressional remedial power. This is true even though the Civil Rights Commission Reports, upon which the bill is based, found violations in certain counties in only eight Southern States. The findings in section 2(a)(1) are, therefore, determinative of congressional authority to enact voter qualifications applicable to both Federal and State elections. To support this extreme remedial action by Congress, the findings must be supported literally with respect to the language that the voter qualifications prohibited by the legislation have been used to deny rights protected under the 14th and 15th amendments. See *Civil Rights Cases* (100 U.S. 3 (1883)).

(2) It is possible that the findings are subject to judicial attack as to their validity. Although entitled to considerable weight, they are not conclusive. Mr. Justice Holmes stated in *Block v. Hirsh* (256 U.S. 135, 154-5 (1921)):

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. * * * But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost worldwide fact."

B. Implicit in section 2(a)(2) is an additional congressional finding that any voter qualification test which is subjectively graded is open to undesirable administrative discretion which might impair registration and voting free from racial discrimination. The English language and mental competence requirements could fall into this category.

(1) We have some doubt whether so much of the bill as prohibits a mere English language requirement, without more, or a requirement of sanity, or possibly other requirements now in general usage, is constitutional. Apparently, there are several States, New York, Oregon, and Washington, which require merely an ability to communicate in the English language. These statutes would appear to be perfectly constitutional unless applied in a discriminatory manner. So would a provision such as the Nebraska Constitution (Art. VI, § 2) which requires sanity.

(2) To date, there has been no showing that the English language requirements alone, or the mental competence requirements, have been improperly applied on racial grounds. To the contrary, the inference from the 1961 U.S. Commission on Civil Rights Report, p. 21, is that the mere ability to speak English has been used as a substantial bar only in the State of New York, and not on racial grounds. There was no evidence that racial discrimination exists in any of the 38 States outside of the South.

(3) On balance, however, we feel that the English language and sanity requirements are an integral part of the battery of voter qualification tests, literacy and otherwise, which have demonstrably been applied discriminatorily on the basis of race or color in a substantial portion of the United States. This should be enough to support the legislative finding. On this ground, it is likely that the present U.S. Supreme Court would, upon an evaluation of the total effect of the bill, hold it to be constitutional.

Respectfully,

JOHN M. GRADWOHL,
Associate Professor.
WALLACE M. RUDOLPH,
Assistant Professor.

NORTH DAKOTA UNIVERSITY LAW SCHOOL

GRAND FORKS, N. DAK., February 22, 1962.

Senator SAM J. ERVIN, Jr.,
Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: In a letter of February 13, 1962, you requested an evaluation of S. 2750 and S. 480 in terms of constitutionality and desirability.

It is my opinion that S. 480 would not be open to successful challenge before the U.S. Supreme Court if enacted in its present form, since it appears to be legislation of a type contemplated by the 15th amendment. I have a criticism of S. 480 relating to a matter of detail which appears later in this letter. With respect to S. 2750 the question seems to me more complicated, and I regard S. 480 as somewhat more desirable than S. 2750 for that reason. Concerning the constitutionality of S. 2750 insofar as it deals with discrimination in voting on racial grounds I am reasonably clear. However, I cannot see all the way through some of the potential ramifications of S. 2750 so far as it deals with the question of mastery of the English language as a prerequisite for voting, and feel that some of the questions which come to mind concerning it could only be worked out on the basis of factual data presented to the committee.

The constitutionality of establishing a presumption of competence to vote from proof of a sixth-grade education does not really appear to me open to serious question. Legislation defining the educational qualifications required before a man can legally undertake various types of significant activity has often been enacted in the past by both the State and Federal Governments. It is constitutional to condition the practice of law on completion of a course of education in law, just as it is constitutional to provide that a person without education of any sort is incompetent to vote. The question presented in this regard is one of degree and the reasonableness of the standard suggested, and I certainly could not advise the committee that I felt this particular standard was so arbitrary as to be unreasonable from a due process or equal protection standpoint.

Such cases as *Lassiter v. Northampton Election Board* (360 U.S. 45 (1959)), and *Guinn v. United States* (238 U.S. 347 (1915)), do not seem to me to furnish any adequate basis for a contrary opinion. It is true that in *Lassiter* a North Carolina statute imposing a literacy test as a condition of the right to vote was upheld as constitutional. But it should be remembered that a statute may be

evaluated by the Supreme Court in terms of constitutionality (a) on its face, (b) as interpreted by the courts of the State which has enacted it, or (c) as applied in practice. The *Lassiter* case merely upheld the statute on its face. If the statute were applied in a discriminatory fashion, however, it is clear the Court would strike down such an application as unconstitutional. The opinion carefully stated as much. I have reference to language found in 360 U.S. at 53. Nor do I appraise various statements found in *Gunn* as being of controlling significance. Others will undoubtedly discuss the nuances of language found in these various precedents in much greater detail, and I see no reason to merely duplicate such discussions.

As a lawyer, it seems to me this is one of the not uncommon situations wherein the things said, or left unsaid, in various precedents are not nearly as important as the facts of the case at hand. The decisive question appears to me to be whether the evidence before the committee demonstrates with reasonable clarity that literacy tests are being misused to deprive colored citizens of the vote in a substantial number of instances. If so, the Congress has a clear right to enact appropriate legislation under the terms of the 15th amendment, and, in my opinion, ought to do so.

As noted, I have a minor criticism of S. 480. On page 3, lines 22-23, there appears language which seems to make accreditation of a school by any State or by the District of Columbia a condition precedent to legal qualification of that school's sixth-grade graduates as voters. In certain areas of the country, I think experience indicates that implementation of this legislation will be resisted. If enacted in its present form, there thus exists a reasonable possibility that formal accreditation of schools attended primarily by Negro children might be either withheld, revoked, or granted on some sort of conditional basis. This would require lawyers trying a case arising under S. 480 to litigate the question of accreditation, including the validity of various forms of accreditation, in order to prove that a man was or was not qualified to vote. It would also make such cases more complex and more expensive to the parties.

Without being wedded to any particular form of language, I, therefore, suggest that beginning with line 21 of page 3, S. 480 might well be usefully amended to read approximately as follows:

"Judged an incompetent who has (a) completed the sixth primary grade in a school accredited by any State or by the District of Columbia, or in a school or schools found to be substantially equivalent, or (b) who is shown to have attained a degree of education substantially equivalent to the sixth grade education furnished by accredited schools of the State or District wherein the citizen resides." (Emphasized material is new.)

Such an amendment would also tend to remove the influence of racial politics from the field of accreditation as far as possible, and seems to me desirable for that reason.

I prefer S. 480 to S. 2750 for a number of reasons, some of which are legal in nature and some of which are based upon assumptions of fact. To the extent that the points which follow are based upon assumptions of fact, my position could be readily modified upon presentation in the record of contrary data. Upon a mere reading of the face of the two bills, however, the following points come to mind:

1. S. 2750 appears to link the question of purely racial discrimination in voting with a logically separable question whether a voter should be able to understand the language in which public affairs are conducted. It thus ties a strong case to one which is a good deal weaker. In terms of analogy, the joinder of claims in the bill seems a bit inappropriate and may result in a complete denial of any relief to the parties in a situation where some relief ought to be granted.

2. When we talk politics in this country, most of us do it in English. A man seems to me a fairly dubious risk in terms of his capacity to cast a meaningful ballot if (a) he cannot discuss politics with the majority of his countrymen because he cannot speak their language, (b) he cannot obtain the benefits of listening personally to such exchanges of views as occurred in the Kennedy-Nixon debates because the language used is foreign to him, (c) he cannot watch a nominating convention on television and follow the proceedings, (d) he cannot comprehend promises and pledges made by a candidate for public office except through the use of an interpreter, and (e) he cannot read the numerous articles of comment and opinion appearing in the general American press, but is restricted to a limited number of publications printed in a localized area and concentrating primarily on local news.

3. The case of a man who is subject to the foregoing limitations seems to me completely different from the case of a man who speaks in English, reads in English, thinks in English, can haggle and bargain and question candidates in English, can grasp the significance of nuance and inflection in a candidate's answer when the candidate is placed under pressure, and who is denied the right to vote simply because his skin happens to be a bit darker than the skin of some other citizens. The average candidate, particularly when running for State or local office, cannot make a meaningful personal contact with a citizen who does not speak English. But the color of a man's skin does not prevent the average candidate from sitting down with an English-speaking voter and talking turkey. This is how a lot of candidates win elections in my part of the country, and I doubt the situation is much different elsewhere. Thus as a practical matter a difference in color does not necessarily operate to hamper the voter's process of choice and decision. A language barrier hampers a voter pretty badly.

4. It is hard to see how one can justify extending the vote to citizens who speak only Spanish without also extending it to citizens who are restricted to other foreign languages. Without benefit of a detailed factual survey, I nevertheless venture the suggestion that numerous foreign-language groups are encountered in numerous American communities. Is a continued denial of the vote to other linguistic groups to be predicated on the alleged comparative excellence of the Spanish-language American press (see S. 2750, p. 2, l. 16-18) in contrast to other foreign-language publications? Is there a legal basis for favoring Puerto Ricans in New York and not Polish Americans in Chicago? Or inhabitants of Indian reservations who speak only Cherokee or Choctaw or Navajo? Or Germans in Milwaukee? Or Armenians in Fresno? Or Syrians, Arabs, Chinese, or Japanese persons? Must members of these other linguistic groups litigate the adequacy of their newspapers in order to establish a right to vote? If equal protection is an implicit connotation of due process, can the Federal Government extend such a benefit to one linguistic group and deny it to others consistently with the fifth amendment? And that equal protection is implicit in due process has been squarely held. *Hurd v. Hodge* (334 U.S. 24 (1948)).

5. The barrier of language is a transient phenomenon. The problem of race is permanent. The American citizen who cannot speak English is a vanishing breed. His number dwindles each year with death and the education of his children. His own problem as an individual is soluble at night school. His general problem has been solved satisfactorily in case after case of immigration waves reaching this country. But the American citizen whose skin is darker than most is a permanent component of the population. No amount of education or training can change the color of his skin. His problem is therefore one of long-term character and possesses a much greater significance. Different considerations apply to the two cases.

6. S. 480 seems more consistent with the Federal-State tradition than does S. 2750. Primary responsibility for election laws has historically rested with the States. It belongs there. A system of decentralized administration of elections renders it much more difficult for any single faction or pressure group to manipulate or control the outcome of national elections. Exceptions to this valid principle of State control ought to be made only after meticulous consideration and with great deliberation. In the case of the Negro citizen, the case for Federal legislation is strong. Experience demonstrates that even officials of good will, acting on the State level, cannot terminate discriminatory practices because of local political realities and prejudices. In the case of the non-English-speaking citizen the case for Federal legislation is weak. The particular legislation would affect only a single group in a single State. No showing has been made that a fair hearing and reasonable decision on the issue cannot be obtained from the legislature of that State. New York is, indeed, noted for the militancy with which it protects civil and political rights of its citizenry. The issue is constantly discussed and agitated there. There is no reason for the Congress to overrule the New York Legislature, because there does not exist the same justification for Federal action on the issue—with all of its attendant constitutional dislocations—that exists in the case of the long-settled and apparently incurable pattern of racial discrimination against Negroes exhibited by some of the Southern States. This is particularly true when, as pointed out in paragraph 5, above, one problem is temporary and the other is permanent.

The authorization for insertion of this expression of views in the committee records which your letter of February 13 requested is, of course, willingly given. Please accept my thanks for the opportunity to present these views to the committee. I hope they will prove useful to at least some small degree.

Yours most sincerely,

CHARLES LIEBERT CRUM,
Professor of Law, University of North Dakota.

NOTRE DAME LAW SCHOOL

NOTRE DAME, IND., February 23, 1962.

HON. SAM J. ERVIN, JR.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you very much for your letter under date of February 13, 1962, inviting me to express my opinion, as a professor of constitutional law, with respect to the constitutionality and desirability of the proposed legislation set forth in S. 480 and S. 2750.

In your letter, after citing and quoting certain provisions of the Constitution and certain decisions of the Supreme Court of the United States, you ask whether the provisions of the bills in question can be reconciled with the cited holdings and with the applicable provisions of the Constitution. I believe they can.

There can be little doubt that the several States have power to establish voter qualifications, but if in the purported exercise of this acknowledged power a State violates the rights of citizens of the United States guaranteed by the Constitution such purported exercise of the power must be held void. The case of *Guinn v. United States*, cited in your letter, is an illustration of the application of this principle. The so-called "grandfather clause" was held to be invalid under the 15th amendment even without special legislation on the part of Congress.

In this connection it is interesting to note that in *United States v. Raines* (362 U.S. 17) where the constitutionality of recent amendments to section 1971, title 42, United States Code, was in issue, the Court stated at page 25:

"And as to the application of the statute called for by the complaint, whatever precisely may be the reach of the 15th amendment, it is enough to say that the conduct charged—discrimination by State officials, within the course of their official duties, against the voting rights of U.S. citizens, on grounds of race or color—is certainly, as 'State action' and the clearest form of it, subject to the ban of that amendment, and that legislation designated to deal with such discrimination is 'appropriate legislation' under it."

If Congress were to find "that tests of literacy have been used extensively as a device for arbitrarily and unreasonably denying the right to vote to otherwise qualified persons on account of race or color," it would appear that in the light of such a finding the proposed legislation, if enacted, would be appropriate legislation within the meaning of the 15th amendment. This would be so even and to the extent that the proposed legislation would abrogate literacy tests "in the case of any citizen who has not been adjudged incompetent who has completed the sixth primary grade in a school accredited by any State or by the District of Columbia." By well established principles of law the provisions of a State law or constitution must fall when they conflict with an act of Congress passed pursuant to the Constitution.

It may well be urged that this line of argument proves too much. All Congress has to do is to find any voter qualification provided for by a State as one used as a device for discrimination on account of race or color and then any qualification can be constitutionally substituted by Congress for the State qualification. This objection would seem to imply that the Congress of the United States would act in a completely arbitrary manner without regard to whether there was actual discrimination in the States on account of race or color. Such an assumption of irresponsibility on the part of Congress is surely without warrant. It is for Congress to discover the facts and legislate accordingly.

It is perhaps worthy of note that the proposed legislation would in no wise restrict the right to vote. The necessary operation and effect of such legislation would be to extend the franchise to many who are now wrongfully deprived because of discrimination on account of race or color.

The term "race" has from the time of adoption of the 15th amendment until now been considered as having primary reference to the "Negro race." However, I see no compelling necessity to confine the application of the term to persons of so-called African descent. It would seem appropriate to apply the term "race" in connection with any discrimination on account of ancestry, for example, Chinese, Japanese, Mexican, Puerto Rican, and so forth. I mention this factor in connection with a consideration of S. 2750, which would apply only to Federal elections but which singles out citizens educated in the Commonwealth of Puerto Rico for special mention. In the case of such citizens there might well be a finding on the part of Congress that there is discrimination in the application of literacy tests that is in actuality a discrimination on account of race or color.

As to your question regarding the constitutionality of creating a presumption in law that completion of a sixth grade education is of itself proof of literacy and the capacity to exercise the franchise intelligently, permit me to say that such a presumption would appear not unreasonable. In *Helvering v. City Bank Farmers Trust Company*, 296 U.S. 85, at page 90, it is stated: "The test of validity in respect of due process of law is whether the means adopted are appropriate to the end." The connection between schooling and literacy is obvious. A legal presumption based on such a connection is a far cry from the presumption condemned in *Tot v. U.S.*, 319 U.S. 463, or even that condemned in *Heiner v. Donnan*, 285 U.S. 312.

As to the desirability of the proposed legislation there can be little doubt in the mind of Americans who are sincerely committed to the American proposition that all men are created equal. One man one vote should be, and I think it is an axiom of our great Republic. The clogs and inconveniences placed upon voting in parts of the United States are a national disgrace. As an American citizen who is concerned about the welfare of the United States in the world of the second half of the 20th century, I respectfully urge the subcommittee to bring in a favorable report on the proposed legislation to the end that government of the people, by the people, and for the people shall not perish from the earth.

I should be honored if you would insert the expression of my views in the printed record.

Sincerely,

ROGER PAUL PETERS,
Professor of Law.

OKLAHOMA UNIVERSITY LAW SCHOOL

NORMAN, OKLA., February 26, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman, U.S. Senate Subcommittee on Constitutional Rights, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR ERVIN: Dean Sneed of this school has referred to me your inquiry of February 13, relating to the constitutionality of the two bills, S. 2750 and S. 480, relating to literacy tests for voting. In view of the complicated nature of the problems involved, I believe it will be better to take in order the various constitutional provisions which might have significance, analyzing the provisions of each bill with reference thereto, rather than to take the provisions of the bills in order and to attempt to relate each provision to various constitutional provisions.

As you will see, I do not feel that a general statement as to constitutionality or unconstitutionality is possible. There are some provisions of these bills for which I find it difficult to find a constitutional underpinning. There are others which I think clearly are within the constitutional power of Congress. There are still others with respect to which it seems to me no definite answer can be returned in the present state of the authorities.

ARTICLE I, SECTION 4

This provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators." This, of course, needs to be read in connection with the provisions that, the "House of Representatives

shall be composed of members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" (Art. I, §2), and that, as to Senators, "The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures" (17th amendment).

The significant issue, of course, is whether, in view of the just-quoted provisions as to the qualifications of electors for the Senators and Representatives, Congress has power to fix requisites for such electors, independent of State provisions as to qualifications to vote for State legislators, as an exercise of the power to make regulations concerning the "Manner of holding elections." S. 2750, section 1(f) invokes this provision as a ground for the proposed enactment of a prohibition upon literary tests for suffrage as applied to "Federal Elections," as to persons who have completed the sixth grade.

Up to the present time, no act of Congress has presented an occasion for judicial interpretation respecting this question, or any question remotely related thereto. However, the general principles of interpretation, which state that, in case of apparent conflict, particular provisions prevail over more general provisions, that constitutional provisions are to be construed together, giving meaning and effect to each portion, wherever possible, and that words ordinarily are to be construed in accordance with their common meaning seem to me to call for the result that "Manner of holding elections" does not include the fixing of qualifications for electors. The debates in the Constitutional Convention, as reported in Madison's Notes under dates of August 7 and 8, 1787, seem to confirm this, the general tenor of the debate indicating agreement with the thought that what now is article I, section 2, would give the States full control over the qualifications of electors. It also is to be noted that the debate, on August 9, concerning what now is article I, section 4, does not indicate that this provision was regarded as giving to the Congress any power respecting qualifications of electors. Moreover, it is clear that the provision could not have been regarded as permitting Congress to prescribe qualifications concerning electors for Senators in the face of the original prescription of article I, section 3 that Senators should be chosen by the legislatures of their respective States. See also *The Federalist*, No. 60. To my mind, the weight of the available data suggests that, so far as the provisions of S. 480 and S. 2750 rely upon article I, section 4 for constitutional basis, they cannot be sustained. However, we do not have authoritative decision upon this point.

ARTICLE I, SECTION 8, LAST CLAUSE

This is the familiar "sweeping clause," giving Congress power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis supplied).

The wide application of this principle was stated by Chief Justice Marshall in words which cannot be bettered, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 418.

Now, the Constitution gives to the United States the power to have duly chosen officers, executive and legislative. It seems clear that this part of article I, section 8, empowers Congress to enact any legislation, not in conflict with other provisions of the Constitution, directed toward bettering the selective process. *Ex parte Yarbrough*, 110 U.S. 651; *U.S. v. Classic*, 313 U.S. 299. See also Mr. Justice Pitney's illuminating concurrence in *Newberry v. U.S.*, 256 U.S. 232, 275 at 285-287. The doubtful questions arise with respect to the explicit application of this principle.

Since, as already indicated, the Constitution seems clearly to assign to the States, at least within limits not here important, the authority to prescribe the qualifications of electors for Members of the Senate and of the House of Representatives (through the prescription of the qualifications of electors for the most numerous house of the legislatures in the respective States), it seems clear that the "sweeping clause" cannot be invoked to give Congress power over that subject. This would be violating the implied limitation on congressional power-

already noted. This reasoning would deny to Congress authority, under this section, to proscribe State literacy tests basic to the right to vote for Members of Congress at general elections. Neither S. 480 nor S. 2750 could derive constitutional support from the necessary and proper clause, with reference to general elections for Members of Congress.

A different problem is presented with respect to qualifications for voting in primary elections to choose political party candidates to be voted upon at the final election. If we should accept the theory that the so-called primary elections are part of the general process of selection, so that the primary is itself but one phase of the election, Congress would have no more authority over the qualifications for participation therein than it would have as to the general elections. If, on the other hand, the primary is analogized to its historical antecedents, the party convention, or the caucus, formal or informal, it would not be regarded as an election and the participants therein would not be electors in the constitutional sense. If this is so, congressional regulation of the qualifications for participation could be upheld under the necessary and proper clause. Pronouncements in Supreme Court opinions face both ways in respect to this matter of classification. See the various opinions in *U.S. v. Classic*, *supra*, *Newberry v. U.S.*, 256 U.S. 232; *Nixon v. Herndon*, 273 U.S. 536; *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461. In my opinion, the Court might rule either way, in respect to this point, and still be able to cite past pronouncements in favor of the chosen classification. Consequently, I must say that, at present, Congress power to determine the qualifications of voters at congressional primaries, as an exercise of the authority vested in it under the necessary and proper clause, remains in doubt.

When we turn to the other offices mentioned in the definition of the term "Federal election" contained in S. 2750, namely candidates for President and Vice President, and presidential electors and delegates or Commissioners from the territories or possessions, I entertain no doubt that Congress has authority, by virtue of the necessary and proper clause, to establish qualifications for electors. The reasoning upon which this conclusion is based has been set forth already.

In summary, I think that congressional regulation of the qualifications of electors in presidential and vice presidential nominating primaries, and in nominating primaries and in elections for presidential electors and for delegates or commissioners from territories or possessions, may be sustained under the necessary and proper clause of article I, section 8 of the Constitution. I do not think this clause will sustain such prescription as to elections for Senators and Representatives. I think the issue is in doubt, as to primary elections for choosing candidates for the last mentioned offices. My personal view is that such a regulation should be sustainable, because I do not think that the nomination procedure is any part of the election of such officers, in the sense in which that term is used in the Constitution.

FIFTEENTH AMENDMENT

I turn aside from the order of constitutional position, because the 14th amendment presents far wider ranges of possible power than does the 15th amendment. This last amendment forbids States to deny or abridge the right to vote on account of race, color, or previous condition of servitude, and vests in Congress power to enforce this prohibition "by appropriate legislation." It may be added that, without this specific grant, Congress undoubtedly would have had the same authority under the necessary and proper clause.

Literacy tests, unrelated to racial or other considerations banned by this amendment, obviously are not forbidden thereby. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45. Cf. *Williams v. Mississippi*, 170 U.S. 213. On the other hand, such provisions cannot be upheld when coupled with other restrictions designed to restrict suffrage on grounds of race, *Guinn v. U.S.*, 238 U.S. 347; *Lane v. Wilson*, 307 U.S. 268, particularly when administered in accordance with a policy of discrimination based on racial considerations. *Schnell v. Davis*, 336 U.S. 933, affirming, per curiam, *Davis v. Schnell*, 81 F. Supp. 872. Congress clearly may legislate against such discrimination. *U.S. v. Raines*, 362 U.S. 17. Hence it is very clear that that portion of S. 2750 which defines the forbidden "deprivation of the right to vote" as "the application to any person of standards or procedures more stringent than are applied to others similarly situated," would be, as applied to discriminatory administration of voting standards, directed toward considerations of race, color, or previous condition of servitude, an entirely valid exercise of congressional power.

The more difficult question is with respect to the prohibition of literacy tests, and other examinations, as applied to persons who have completed the sixth grade in "any public school or accredited private school." This seems to be intended as a congressional determination that literacy tests, as applied to such persons, constitute means utilized for the purposive exclusion, on racial grounds, of persons from the suffrage. See sections 1(b) and 1(c) of S. 480, and 1(c) of S. 2750 and (e). It seems to me that this is a proposition that cannot be sustained as a matter of judicial knowledge, and certainly not as a picture of conditions throughout the country. No doubt, if literacy tests are used to achieve such discrimination, Congress may legislate with respect to it. *U.S. v. Ruines, supra*. But I should think it impossible to contend successfully for judicial notice that in all the States imposing a literacy test, as enumerated in footnote 7 to the opinion in *Lassiter v. Northampton County Board of Elections, supra*, discriminatory administration along racial lines is prevalent, or that the necessary effect of literacy qualifications is to discriminate against racial groups. Hence I do not see how the provisions of either S. 480 or S. 2750, purporting absolutely to bar the use of literacy tests as against those who have completed the sixth grade, can be sustained as legislation designed to enforce the 15th amendment.

FOURTEENTH AMENDMENT

The 14th amendment, section 5, confers on Congress authority to enforce its provisions by appropriate legislation. This authority would exist under the necessary and proper clause of article I, section 8, in any event.

The first section of the amendment provides, inter alia, that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". However, it was held many years ago that participation in the suffrage is not one of the privileges or immunities of a citizen of the United States as against the States. *Minor v. Happersett*, 21 Wall. 162. This decision never has been overruled or modified. Hence, Congress would have no authority, as to a non-Federal election, or as to Federal elections in which electoral qualifications are by the Constitution related to State law, to ban literacy tests on the theory that they abridge privileges or immunities of citizens of the United States.

Passing for the moment the due process and equal protection clauses of the 1st section of the 14th amendment, we note the provision of the 2d section that "when the right to vote at any election" for the choice of Federal legislative and executive officers or State legislative, executive, or judicial officers "is denied to any of the male inhabitants of" a State "being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other, crime, the basis of representation" in the national House of Representatives "shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State". This provision was ruled expressly in *Lassiter v. Northampton County Board of Elections, supra*, to have no effect, of itself, to bar literacy tests. See also *McPherson v. Blocker*, 146 U.S. 39. Hence it is arguable that it does not express a general constitutional policy to forbid limitations upon the suffrage other than those stated therein. The most likely meaning is that it directs the House of Representatives to discourage such limitations by refusing admission to excess Representatives from a State which imposes other restrictions. Possibly, it intends that Congress shall take these reductions in the electorate into account in passing apportionment legislation. It does not seem likely that it could be regarded as giving Congress authority to forbid directly the imposition of these restrictions. The enumeration of the specific action to be taken seems to exclude general enforcing legislation along other lines. In other words, this provision does not prohibit other restrictions on the suffrage than those specifically enumerated. It permits such restrictions, if the States imposing them are willing to run the risk of decreased congressional representation. Discouragement, rather than prohibition, is the course adopted by the amendment. Consequently, I do not believe Congress can derive a general power to prohibit State employment of qualifications for the suffrage from this provision. It leaves congressional power restricted to the instances which I have already noted as being within other delegated powers of Congress.

However, it must be admitted that the section does express a constitutional disapproval of restrictions upon the suffrage, other than those expressly sanctioned therein. Therefore, it may be argued, Congress may legislate to give effect to this disapproval by sanctions other than those expressly stated in the

section. Hence, until we have authoritative decision, I do not believe that, properly, it may be stated categorically that section 2 of the 14th amendment would not confer upon Congress power to outlaw State restrictions on suffrage not specifically approved in that section.

This brings us to the due process and the equal protection clauses of the 14th amendment. It is hornbook law that these clauses respectively protect the individual, in his interests of liberty from arbitrary and unreasonable action on the part of the State, and, in respect to interests of all sorts, even privileges, from unreasonable discrimination imposed by State law. This is so well established that no specific citations are necessary. However, it is well to note that irrelevant discrimination in respect to eligibility to vote in a party primary has been held to violate the equal protection clause in *Nixon v. Herndon*, *supra*. It is also to be noted that, in *Lassiter v. Northampton County Board of Elections*, *supra*, the Court entertained the "question whether a State may consistently with the 14th * * * amendment[s] apply a literacy test to all voters irrespective of race or color." The Court expressly disclaimed holding "that any standards which a State desires to adopt may be required of voters." It also spoke of the right of suffrage as "subject to the imposition of State standards which are not discriminatory and which do not contravene any restrictions that Congress, acting pursuant to its constitutional powers, has imposed." This implies a right in Congress to impose restrictions.

We may deduce from these statements that invidious and unreasonable distinctions and irrelevant standards, applied to the qualifications of suffrage, will violate the 14th amendment. We may deduce, also, that Congress, by virtue of its enforcement power delegated by section 5 of the amendment, and probably as well under the necessary and proper clause of article I, section 8, may pass laws to forbid such violations.

Since *Lassiter v. Northampton County Board of Elections*, *supra*, upheld, as against 14th amendment objections, a literacy qualification for voters, applied across the board, the question arises whether any congressional ban on literacy tests may be upheld. In other words, may Congress ban a test which the Supreme Court has held to be consistent with due process of law and with equal protection of the laws? The superficially obvious answer is "no," but the issue is not quite that simple. "Congress, by virtue of the 5th section of the 14th amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive or the judicial department of the State. The mode of enforcement is left to its discretion," *Virginia v. Rives*, 100 U.S. 318. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the object the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339. These broad statements never have been modified or rejected, that I can discover. Accordingly, congressional enactment might forbid State action, tending to break down the privileges secured by the 14th amendment, which the judges, in the absence of such enactment, might not consider clearly to be in contravention of those privileges. An analogy is presented by the well-established authority of Congress to preempt State laws burdening interstate commerce, although, in the absence of congressional action, the Court might not consider that they unconstitutionally impinged thereon.

In the second place, the plaintiff in the *Lassiter* case, as appears by the report thereof before the Supreme Court of North Carolina, was illiterate, and so could not be regarded as meeting in any way the State's policy of requiring a minimally educated electorate. *Lassiter v. Northampton County Board of Elections*, 248 N.C. 102, 102 S.E. 2d 853. It would not necessarily follow that the test approved by the Supreme Court, as applied in the *Lassiter* case, would be consonant with either equal protection of the laws, or with due process, as applied to persons having substantial educational experience and literary capability. Hence, it seems to me quite likely that, in spite of the decision in the *Lassiter* case, and certainly in spite of anything contained in other decisions less in point, the Supreme Court will sustain any congressional regulation directed toward preventing arbitrary or discriminatory limitations on the franchise.

The really serious problem, in my opinion, is whether the imposition of literacy tests upon persons who have completed the sixth grade could be regarded either as arbitrary, or as unreasonably discriminatory. I think that to apply such tests to college graduates might well be regarded as arbitrary. Cf. *Schnell v. Davis, supra*. On the other hand, in view of the complexity of the issues with which voters in our day must deal, I incline to the belief that to excuse people from demonstrating their literacy by some other proof than their certificate of completion of the work of the sixth grade may be drawing the line too closely. The Supreme Court, in view of all the evidence that has accumulated concerning reading incapacity on the part of those who have gone much further along the pathway of formal education, might well say that it is not arbitrary for the States to require more convincing proof of literacy. For myself, I would consider completion of high school a much more significant point at which to draw the line against the application of literacy tests. Obviously, we cannot say with confidence just what regulation on this subject the Supreme Court will rule to be permissible. Hence, once more, I am forced to say that I do not think it possible to give a clear-cut answer concerning the constitutionality of either S. 480, or S. 2750, insofar as they purport to impose upon the States a prohibition of literacy tests in respect to elections wherein the State has the right, in the first instance, to set electoral qualifications. As is so often the case, all that can be said with certainty is, "Ask the Supreme Court." Since the Supreme Court cannot render advisory opinions, the only effective way to get the question before it is to enact whatever law is deemed desirable, thus permitting the issue of constitutionality to be raised properly in the course of litigation.

Your letter also asked my opinion concerning the desirability of these measures. This is a somewhat difficult question to answer, because, as I have indicated, I am not at all of the opinion that the standard of completion of the sixth grade is at all sufficient by which to secure a qualified electorate. However, neither am I convinced that the ordinary literacy test provision, particularly one that is directed toward reading or writing some constitutional provision, is any more meaningful, and such a test does lend itself to arbitrary administration. I am definitely of the view that we must eliminate from our electoral system all elements of invidious, irrelevant, and arbitrary discrimination against citizens, based on racial or other impertinent distinctions. This is especially pressing because of the struggle in which we are engaged to maintain a free world against the threat of Communist tyranny. But, if this emergency did not exist, we still would owe this duty to our own democratic genius. On the other hand, I certainly am in accord with the view that we need an intelligent electorate. Probably the best statement of my own view as to policy is that any congressional action, which I am convinced would have to be based upon 14th amendment grounds to be made applicable to all elections, should be directed toward establishing an objective test for intellectual capacity, leaving it to the States to accept or reject it as they might be moved, and to forbid literacy and like tests on the ground that they are not sufficiently related to insuring a competent electorate and are so capable of improper administration as to be a threat to equal protection of the laws. This, I think, could be sustained under the 14th amendment, though not necessarily under the 15th.

This letter is much too long, but the complexity of the questions raised by these bills has precluded a shorter answer. You are, of course, at liberty to make such use of them in the printed record as you may deem appropriate.

Sincerely yours,

MAURICE H. MERRILL,
Research Professor of Law.

NORMAN, OKLA., March 30, 1962.

Hon. SAM J. ERVIN,
*Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: This is in response to your letter of March 23, transmitting a copy of S. 2979 and requesting my opinion concerning the constitutionality thereof.

In the interests of brevity, I will not undertake detailed discussion of the authorities supporting my views as to the constitutional powers of Congress in respect to voting qualifications. These were developed fully in my letter of February 26, 1962, commenting on S. 2750 and S. 480. It would unduly

encumber the record to go over them, and I hope that the subcommittee will regard the previous letter as incorporated herein by reference.

Section 2(a) (2) of S. 2979 expressly founds that bill upon the powers granted to Congress by section 5 of the 14th amendment and by section 2 of the 15th amendment to enforce the provisions of those amendments. It is unquestionable that, under these grants, read in connection with the "necessary and proper" clause of article I, section 8 of the Constitution, Congress may enact any legislation reasonably related to the prevention of the restrictions upon voting rights forbidden by those two amendments.

Section 2(a) (1) of S. 2979 undertakes to relate to the 15th amendment the prohibitions prescribed in section 2(b) upon State restrictions on suffrage other than reasonable age requirements, reasonable requirements as to length of residence in the State and its political subdivision, "legal confinement at the time of election or registration," and "conviction of a felony." It does so by means of a legislative finding that these other qualifications "are susceptible of use, and have been used, to deny citizens the right to vote, because of their race or color." I have no doubt whatever of the constitutional power of Congress to prohibit the actual use of such qualifications as a smokescreen behind which to shelter deprivations of the right to vote on grounds of race or color. See my letter of February 26, at page 4. On the other hand, while the courts accord great weight to legislative findings of fact as the foundation for exercise of legislative power, *Nebbia v. New York*, 291 U.S. 502 (1934), these findings are not conclusive and where doubt exists the issue will be decided on the basis of facts as developed through the judicial process in the particular litigation. *Chastleton Corp. v. United States*, 264 U.S. 543 (1924). Hence, I do not believe that, by itself, this congressional factfinding would be conclusive upon the courts. Moreover, the finding is not that these restrictions are universally or even primarily used to cloak violations of the 15th amendment. It finds merely that they are "susceptible of use, and have been used" for that purpose. This might lay a foundation for Congress to forbid the employment of those restrictions by a State if the evidence showed that their employment therein had been as a cover for denial of the suffrage on the ground of race or color. I do not believe that it can be used as a ground for a general prohibition upon the use of such restrictions in all States, even in those States in which they are administered with an impartial disregard of race or color. Accordingly, I should expect that the invocation of the 15th amendment as a constitutional basis for the limitations contained in section 2(b) would be confined to those instances in which it could be established as a fact that administration of the restrictions was based upon considerations of race and color, and not at all upon the application across the board of the restrictions themselves. So construed, as I think it must be construed in order to uphold its constitutionality, section 2(b) would have no greater practical application, so far as the 15th amendment is concerned, than the specific prohibition of section 4 of the bill.

Turning now to the 14th amendment, the most obvious foundation in that amendment for the prohibitions of section 2(b) is the concept that the prohibited limitations are unreasonable or arbitrary, so as to conflict with the prohibitions of section 1 of the amendment on deprivations of liberty without due process of law or on denials of the equal protection of the laws. The general principles underlying this approach will be found in my letter of February 26, 1962, at page 6. The significant question is whether the restrictions not permitted by section 2(b) all may be characterized as so arbitrary, capricious and unrelated to legitimate regulation of the suffrage as to violate the concepts of due process or of equal protection. It seems to me that this is a very difficult proposition to maintain.

For instance, one effect of section 2(b) would be that States must make provision for the casting of absentee ballots by persons who are away from their precincts of residence upon election day. So far as I can see, this would be an absolute requirement under the section. No provision is made for reasonable regulation of the conditions under which absentee ballots may be cast. Yet, in my own State, so many abuses grew up in connection with absentee voting that the legislature, a few years past, found it necessary to impose extensive regulations and restrictions upon the privilege of voting in absentia. I find it extremely hard to believe that the Supreme Court would rule that such restrictions are so unreasonable and arbitrary as to violate 14th amendment standards. If this is so, it follows that Congress could not forbid them on the ground that they violated such standards. Indeed, in view of the fact that these possibilities

of abuse exist, I do not believe that a total denial of the absentee voting privilege would violate the due process or equal protection concepts. After all, that privilege is of relatively recent adoption, and I think it would be hard to establish that, over all these years, States in general had been violating the 14th amendment because of a failure to accord absentees the right to vote.

Take another example. The laws of most, if not of all, States deny the suffrage to persons of unsound mind. The effect of section 2(b) clearly confines the permitted limitation to those persons of unsound mind who are under "legal confinement at the time of the election or registration." I do not believe that it can be said that it arbitrary or improperly discriminatory to deny the suffrage to persons who have been adjudicated non compos mentis or who in fact are so, even though they have not been committed to institutions. Hence, I regard as extremely doubtful the constitutionality of a congressional prohibition upon such restrictions. Also, there is a serious question whether an inmate of an institution for the support of the poor is properly said to be under "legal confinement." Yet restrictions upon his voting rights are common, and, it seems to me, constitutional. Here is another source of doubt as to the constitutional application of the wide sweep of section 2(b).

These are examples, only. No doubt others could be discovered on careful examination of the various State election laws. It suffices to say that it seems to me that the limitations of section 2(b) are too narrowly drawn to be applicable across the board. I should expect that section to be confined in its application to those restrictions upon suffrage which the Supreme Court determines to be in fact arbitrary or unreasonably discriminatory. So confined, it really adds nothing to existing law, since such restrictions are invalid by force of the Constitution itself, and need no congressional prohibition.

The remaining question is whether section 2(b) may be upheld as an exercise of the power of Congress to enforce the provisions of section 2 of the 14th amendment concerning restrictions on the right of "male inhabitants * * * 21 years of age, and citizens of the United States," to vote. This provision and its possible applications were discussed in detail in my letter of February 26, at pages 5 and 6. I do not believe that I can add anything now to that discussion. The result to which I there came was that I do not think it possible to say categorically, in advance of a decision by the Supreme Court, that this provision does or does not authorize Congress to legislate affirmatively to outlaw restrictions upon the suffrage other than those specifically permitted by it. For reasons stated, I incline to favor the construction that it does not authorize such affirmative legislation. But I realize that the point is arguable and so I refrain from a positive assertion that section 2(b) cannot be justified under it. If the Supreme Court comes to the conclusion that such a power of independent legislation is conferred by section 2 of the 14th amendment, all of section 2(b) of the bill seems to fall within the permissible scope of such a power.

Passing to section 3, concerning literacy tests, I find no substantial difference, so far as constitutionality is concerned, between this section of S. 2979 and the comparable sections of S. 2750 and S. 480. My opinion concerning these sections is set out on pages 7 and 8 of the letter of February 26. That opinion applies equally to section 3 of the present bill. In summary, it is that I do not think a clear answer can be given, on the constitutional issues, in the absence of authoritative decision by the Supreme Court, but that I do incline to the belief that there is an especially grave question as to the validity of a provision banning all tests on literacy or intelligence more stringent than the completion of the sixth grade.

As to section 4 of S. 2979, which prohibits all arbitrary action or inaction, "under color of law or otherwise" in abridgment, etc., of the right of suffrage in any election, this unquestionably is valid. Whatever is forbidden by it is in violation of section 1 of the 14th amendment. It thus, clearly, is within the legislative power conferred upon Congress by section 5 of the 14th amendment, and by the last clause of section 8 of article I of the Constitution. See the discussion on pages 6 and 7 of the letter of February 26.

Section 5 of S. 2979 also is valid, unquestionably. It is simply an exercise of the power to provide for a census under article I, section 2 of the Constitution. It also is sustainable as in aid of the power of Congress to gain information to enable it to exercise its legislative functions in respect to elections, under various constitutional provisions. Ultimately, this derives from article I, section 8, last clause.

Sincerely yours,

MAURICE H. MERRILL,
Research Professor of Law.

RICHMOND (VA.) UNIVERSITY SCHOOL OF LAW

THE VIRGINIA STATE BAR ASSOCIATION,
February 23, 1962.

HON. SAM J. ERVIN, Jr.,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: With reference to S. 2750 and S. 480, I wish to be recorded as being opposed. If there is anything clear in the Constitution it is article I, section 2, leaving this matter to the several States.

I remember so pleasantly your visit to our bar association's annual meeting 2 years ago. I hope you will do everything you can to defeat this legislation.

All good wishes.

Sincerely yours,

WILLIAM T. MUSE, *President.*

RUTGERS UNIVERSITY LAW SCHOOL

CAMDEN, N.J., February 16, 1962.

The Honorable SAM J. ERVIN, Jr.,
Chairman of the U.S. Subcommittee on Constitutional Rights, U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Dean Kepner has handed me your letter, in connection with S. 480 and S. 2750, in regard to literacy tests.

I have examined the bills carefully and have no difficulty at all with S. 2750. Clearly Congress has power over Federal elections. S. 480 raises a little more difficulty.

It is clear under amendments 15 and 19 that Congress has power over the right to vote so far as it concerns Negroes and women. The only difficulty would arise in the question of the right of the States to control white male votes. Since the purpose of the Act is to prevent abuses in restricting the colored vote, I would suggest that there be added to the definition, at the end of S. 480, the words: "when such literacy test is used for the purpose of restricting the right of a person to vote on account of race, color or sex." I have no doubt at all that a statute so directed would be constitutional and could be distinguished from *Lassiter v. Northampton Election Board*, 360 U.S. 45 and *Guinn v. U.S.*, 238 U.S. 346, which you cite in your letter of February 13, because an attack was directed toward the whole literacy test which, of course, would be valid if it were used for purposes of determining qualifications to vote but which is even now invalid under the Civil Rights Act where it is used under color of law to deprive a colored citizen of the right to vote.

Sincerely yours,

FREDERICK K. BEUTEL,
Professor of Law.

CAMDEN, N.J., March 27, 1962.

HON. SAM J. ERVIN, JR.,
U.S. Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Washington, D.C.

DEAR SENATOR ERVIN: I have your letter of March 23, 1962, asking for comment on S. 2979.

For reasons given in my previous letter, I would say that sections 2 and 3 are clearly unconstitutional. See, especially, lines 18 and 19 on page two, and lines 17 and 18 on page three. Section 4 is probably constitutional and a good provision, when read in connection with the section of the revised statutes which it is intended to amend. Section 5 is a useful direction to the Bureau of the Census and clearly constitutional.

Sincerely yours,

FREDERICK K. BEUTEL,
Professor of Law.

SOUTHERN UNIVERSITY LAW SCHOOL

BATON ROUGE, LA., March 8, 1962.

Re Senate bills 2750 and 480.

U.S. SENATE,
Committee on the Judiciary,
Subcommittee on Constitutional Rights,
Washington, D.C.

DEAR SIRs: In reply to your letter of February 14, I am enclosing a short statement of my thoughts on the questions posed in reference to the captioned proposed legislation.

You are authorized to insert my expression of views in the printed record.

Yours very truly,

VANUE B. LACOUR,
Professor of Law.

CONSTITUTIONALITY IN GENERAL

The 14th and 15th amendments not only prohibit deprivation of rights therein guaranteed, but also grant or delegate to Congress the power to regulate by appropriate legislation so as to enforce the respective provisions of the amendments.

When confronted with the question whether Congress may enact a literacy test for electors in national and State and local elections, the first thought is that, since the Supreme Court has on numerous occasions declared that literacy standards exacted by States do not violate the 15th amendment, and, if fairly administered, the 14th amendment, therefore, the right to prescribe literacy standards is exclusively within the reserved powers of States and beyond the reach of Federal legislation.

This, however, seems to be a misinterpretation of the decisions which have upheld State literacy requirements. These decisions were rendered in cases which reached the Court on the issue of whether literacy tests offend the 14th and 15th amendments in their dormant state, and the Court in disposing of these issues has merely made a judicial determination that these amendments do not per se prohibit fairly administered literacy tests. To read into these decisions the further implication that prescription of literary tests is exclusively within the legislative province of the States is to gratuitously interpose a non sequitur.

It seems that an analogy can be drawn here with the operation of the "commerce" clause. In the absence of Congress exercise of its regulatory powers over interstate commerce, the several States may regulate matters of local interest. But when Congress exercises its plenary powers so as to preempt the State-regulated area, the incompatible State regulation must yield by virtue of the "supremacy" clause of the Constitution.

Even though it is not customary to think of the enforcement clauses of the 14th and 15th amendments as the delegation of regulatory powers, it must be conceded that the power to enforce the provisions of these amendments necessarily include the power to enact regulatory measures to effectuate the purposes of these amendments.

If Congress in its legislative wisdom determines that literacy tests, valid on their face, are fraught with the potential of discrimination by invidious administration, and that the cure for the evil by judicial review is fraught with frustrating difficulties on a case-by-case method, it seems to be within the legislative province to remove the source of the evil by supplanting the State standards with Federal standards which are less amenable to subtle misuse for the purpose of evading the constitutional commands of the 14th and 15th amendments.

To conclude that Congress may not exercise its enforcement powers under the 14th and 15th amendments when the effect of such legislation is to regulate that which has hitherto been a domestic matter of the States is to return to the outmoded doctrine of *Hammer v. Dagenhart* (247 U.S. 251). The prevailing doctrine is that where Congress by legislation adopts a policy within the exercise of its delegated authority, it may choose the means reasonably adopted to the attainment of the permitted end, even though they control what has heretofore been a matter left to the States. (See *U.S. v. Darby*, 312 U.S. 100.)

DESIRABILITY OF THE PROPOSED LEGISLATION

It seems that measures designed to remove the present literacy tests are desirable. The present tests are susceptible of subjective administration which make qualification of an elector dependent largely upon the whim and caprice of registration officials. The abuse of the tests and the resulting disfranchisement of the electors is generally beyond the reach of redress and correction by judicial process because proof of facts to show discrimination is utterly difficult and costly.

The broadening of the right of suffrage should prove beneficial to the South where the problem is most acute, for to make the franchise fully available to the Negro will permit the working out of local problems according to normal political processes and thereby lessen the need of Federal intervention on the part of the Executive and the straining of the Federal courts to find legal bases for solving civil rights problems that would normally work themselves out in the crucible of the political processes of a fully enfranchised body politic.

Whether a legislative determination that completion of a sixth grade education is itself proof of literacy and the capacity to exercise the franchise intelligently does not seem to present a constitutional question. The problem seems to be one of legislative wisdom rather than constitutional doctrine. One may or may not be able to demonstrate that the sixth grade level is a wise standard. But it can hardly be said to be arbitrary because it is fixed. For if so, then so would the arbitrary age of 21 be opened to question. It might even be questioned whether literacy is at all a test for the intelligence relevant to the exercise of the franchise. But the nature of the legislative process of necessity entails the right to experiment even if unwisely. It is the nature of a fully enfranchised free society to prod its Legislature in the direction of correction where there is lack of legislative wisdom afloat.

CONSTITUTIONALITY OF THE PRESUMPTION OF LITERACY

Finally there remains the question of who could constitutionally challenge the sixth grade standard. The registration officials would hardly seem to have a justiciable right. Electors who qualified would not have a complaint at all. The only imaginable challengers would be the below sixth grade "illiterates" who suffer disqualification already by virtue of prevailing tests, and since their demand would be to further lower the standard, the issue is not within the concern of the proposed legislation. In short, the question regarding the sixth grade presumption seems to be only a political question.

WESTERN RESERVE UNIVERSITY LAW SCHOOL

CLEVELAND, OHIO, March 7, 1962.

Senator SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I am pleased to reply to your inquiry of February 13, 1962, regarding S. 2750 and S. 480. You may insert my views in the Congressional Record.

I believe S. 2750 applicable to Federal elections is constitutional. The source of authority rests in article I and amendment 15. The voting cases decided by the courts have rather consistently upheld the Federal authority to protect the Federal vote from fraud, violence, and, what appears to be a dilution of a Federal citizen's voting right. If Congress determines by a finding of fact that a Federal citizen's vote is being deprived by unequal application of literacy tests it would be similar to a deprivation by fraud. To fix a 6th grade education appears reasonable as a standard for application of the congressional authority. The grade level is reasonably connected to reading and writing proficiency which influences voting.

True, Supreme Court language upholds literacy tests by the States as valid and suggests that this State power is not to be supervised by the Federal courts. Such language does not bar Federal legislation, however. When Congress acts to regulate the mode and manner of Federal elections under article I, Federal authority is constitutionally exercised. State authority, constitutional till Federal legislation is promulgated, must then give way to Federal supervision.

I have difficulty in upholding S. 480 when State elections are the sole subject of Federal regulation. If the literacy test be applied equally to white or colored State voters, I believe that the State has broader authority to regulate its own elections.

If the literacy test is used to bar colored voters, the "equal protection" clause of the 14th amendment upholds the constitutionality of S. 480. Another source of authority would be amendment 13 as interpreted by Justice Harlan's dissent in *Plessey v. Ferguson*; not only slavery but the badge of slavery was destroyed so any State or private activity which taints a man because of the color of his skin and his ancestor's previous condition of servitude can be eliminated by Federal enactments under amendment 13. We know that no Supreme Court majority has gone this far as yet in the controversial area of white-colored relations. However, the Supreme Court has rather consistently applied a philosophy to its interpretations of our basic charter which expresses the constitutional spirit of adapting the constitutional authority provided to meet the needs of the changing crises confronting the American society.

Chief Justice Marshall: "This provision is made in a Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs" (*McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)).

Justice Mathews: "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*sum cuique tribuere*" (*Hurtado v. California*, 110 U.S. 516, 530-1 (1884)).

Justice Holmes: "With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago" (*Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

Chief Justice Hughes: "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation" (*Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 443 (1934)).

Historically, the common law, our fundamental system of jurisprudence, required several centuries to elevate respect for the individual in order to abolish "tainting by the blood." Are we not in America at that moment of national crisis and world leadership to undergird liberty under law? Can we not abolish in the human affairs of voting "tainting by the color of the skin"? The U.S. Constitution and the American people must become colorblind to fulfill their tasks in the year 1962 and the decades to come.

Sincerely yours,

OLIVER SCHROEDER, Jr.,
Acting Dean for Administrative Affairs.

WESTERN RESERVE UNIVERSITY,
Cleveland, Ohio, April 4, 1962.

Senator SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR ERVIN: I have in hand S. 2979. The constitutional issues I believe I answered in my prior letter on S. 480 and S. 2750.

This bill, however, is more understanding of a very complex matter. I believe the use of census figures to aid in identifying the problem of denial of voting rights is very wise. I also believe the express statements on lawful deprivation of voting rights in section 2(b) are important. The sanction provided in section 4 under elective franchise appears to strengthen voting rights.

Sincerely yours,

OLIVER SCHROEDER, Jr.,
Acting Dean for Administrative Affairs.

WEST VIRGINIA UNIVERSITY LAW SCHOOL

MORGANTOWN, W. VA., February 21, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Dean Clyde L. Colson has referred to me your letter of February 9, together with the enclosure of February 13, 1962, relating to your subcommittee's consideration of voter literacy requirements and more particularly the provisions of S. 480 and S. 2750.

Your February 13 enclosure indicates you consider S. 480 relates to both State and Federal elections while S. 2750 relates only to Federal elections. If this position be accepted, then we must assume that section 1971(a) in the present law (42 U.S.C., sec. 1971(a)) also relates to both State and Federal elections. Under Supreme Court rulings, this may cause constitutional questions concerning the validity of present section 1971(a) and of proposed S. 480. There is less cause for concern as to the constitutionality of S. 2750, limited to Federal elections. However, Federal and State elections are so generally and completely integrated that the Supreme Court may hold the Federal election powers under the Constitution are sufficiently broad and inclusive to encompass the integrated State and Federal election process. *United States v. Classic*, 313 U.S. 209 (1941). If so, then both proposed bills may be constitutionally sound on these grounds.

Another point, however, gives me concern—the sixth primary grade school education requirement. The Supreme Court has recognized that a State may take into consideration residence requirements, age, criminal record, and literacy in determining voter qualifications. (*Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959).) *Breedlove v. Suttles*, 302 U.S. 277 (1937), recognized that States may impose a nondiscriminatory poll tax as a voter qualification requirement. But in these two bills, S. 480 and S. 2750, it is proposed that Congress cure a literacy test problem by prescribing a sixth primary grade school test or standard as a minimum voter literacy qualification. The language as used goes beyond creation of a rebuttable presumption. This, it seems to me, can cause several constitutional questions. On the face of the bill the language tends to stigmatize many voters and to create an arbitrary and discriminatory test. In many areas many voters without a sixth primary grade school education are intelligent people. Many will have sons and daughters in school and in the Armed Forces. They will be people active in business and industry and in the civic and commercial life of their community. They will be familiar with election issues and personalities, will be able and anxious to discuss them, and know how to mark their ballots and operate voting machines. It seems to me that the sixth primary grade school requirement, as in the bills proposed, may be politically, socially, and economically unwise and constitutionally unsound.

No doubt the draftsmen of these bills have considered carefully the language and have concluded the drafts have the validity and reach desired to be attained. We must respect their mature considerations and conclusions. However, since you have invited my comments and since, as a student and teacher of constitutional law and government, I have pondered, through many years, the issues

here presented, I am persuaded that I would be remiss if I declined to express some of my convictions herein. It seems to me that either bill might be somewhat safely simplified. For example, in S. 2750, section 2(b), line 11, consideration might be given to striking the period after the word "election" and adding the following: "* * * by imposition or application of any discriminatory test, standard or procedure on literacy or other voter qualifications."

You are to be commended for your thorough consideration of this important problem.

Sincerely yours,

STANLEY E. DADISMAN, *Professor of Law.*

MORGANTOWN, W. VA., March 28, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights,
Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: With your letter of March 23 you enclosed a copy of S. 2979 and invited my statement thereon in supplementation of my statement by letter of February 21, 1962, on S. 480 and S. 2750 pending before your committee.

S. 2979, a proposed "Federal Voting Rights Act of 1962," encompasses Federal and State elections. To this time I have entertained doubts as to the constitutionality of acts of Congress encroaching on State election areas. *Lassiter v. Northampton County Board of Elections* (360 U.S. 45 (1959)). However, implications of the Supreme Court's ruling in the Tennessee reapportionment case decided Monday, March 26, 1962, on examination and reflection, may dissolve some of those doubts.

The literacy test provisions in section 3 of S. 2979, read in context with other parts of the bill, in my opinion, do not escape the same constitutional shoals encountered in S. 480 and S. 2750. In practical application the bill proposes to write broad and strong language into the literacy laws of all States, prescribing that "the successful completion of six or more grades of formal education * * * shall satisfy all the requirements of any such test," thereby determining in a large measure who may and who may not register and vote in Federal and State elections. This language would establish a rule of law, not simply a presumption. If a citizen passes muster under the provisions of section 2(b) of the bill, then he may register and vote if he has completed six or more grades of formal education; but, if he has not completed six or more grades of formal education, then he will be subject to literacy tests, which requirement in itself, it seems to me, is unconstitutionally arbitrary and discriminatory and comes dangerously close to invasion of first amendment freedoms. Moreover, administration of the successful completion of six or more grades of formal education test will invite and encourage arbitrary conduct sought to be reached and inhibited by the language of section 4 of the bill.

This opportunity to express my views on S. 2979 is appreciated and I trust my comments, although briefly stated, will be sufficiently responsive to your invitation.

Sincerely yours,

STANLEY E. DADISMAN, *Professor of Law.*

YALE UNIVERSITY LAW SCHOOL

NEW HAVEN, CONN., March 20, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Senate Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: Dean Eugene V. Rostow, of the Yale Law School, has forwarded to us your letter of February 9, 1962, soliciting the views of interested members of the Yale Law School faculty with respect to the validity of S. 2750. We appreciate this opportunity to present, briefly, our joint conclusions with respect to the proposed bill:

1. We understand that the chief challenge to the bill's validity stems from the belief that the bill trespasses on the reserved powers of the States to prescribe the qualifications of voters in Federal elections.

2. The primary power of the States to determine the qualifications of voters is not open to question. But it is not an unlimited power. Like every other exercise of State authority, it is limited by the demands of reasonableness and of equality of treatment contained in the 14th amendment. And, because its subject matter is the franchise, it is a power which must be exercised in conformity with the express restraints of the 15th, 17th, and 19th amendments.

3. Beyond this, the power of the States to determine qualifications is also subject to certain affirmative powers of Congress which have special relevance to legislation of the sort here proposed. Among the relevant powers of Congress are the powers (a) to regulate the "manner" of Federal elections, and (b) to implement the 14th and 15th amendments.

4. As we read the proposed bill, it does not challenge the abstract reasonableness of State-imposed qualifications grounded in (a) literacy, and (b) a generalized familiarity with the civic order. What the bill does is define a uniform and reasonable manner—evidence of successful completion of the first six grades of an accredited American school—for measuring these qualifications. Moreover, as we read the bill, it does not purport to affect other types of State-imposed qualifications, e.g., minimum age, or payment of a poll tax. Such other qualifications would remain in full force (unless, of course, their substance or the method of their administration contravened other overriding Federal limitations, such as those which inhere in the 14th and 15th amendments).

5. Apart from the propriety of the bill as an exercise of congressional power over the manner of testing State-imposed qualifications, we think the bill is also a reasonable exercise of Congress power to implement the 14th and 15th amendments. We think that, through the findings of the Civil Rights Commission and otherwise, Congress has reasonable grounds for thinking that literacy tests and tests for familiarity with the civic order have been and are being widely administered for the purpose and with the effect of achieving discriminations and disenfranchisements because of race or color which are proscribed by the 14th and 15th amendments. The bill seems to us a reasonable way of curtailing these widely attested unconstitutional abuses while at the same time giving full scope to the States' legitimate interests in assuring intelligent and informed participation in the electoral process. Cf. *Guinn v. United States*, 238 U.S. 437; *Lane v. Wilson*, 307 U.S. 268.

6. There is one aspect of the proposed bill as to which we entertain some doubts. We refer to the bill's apparent purpose to obviate any inquiry into whether a Federal voter is literate in English. Absent findings (and we know of none) which clearly document the use of linguistic distinctions as a subterfuge for forbidden discriminations on the basis of race or color, we think this aspect of the bill must stand or fall as an exercise of congressional power over the manner of testing qualifications for participating in Federal elections, along the lines indicated in paragraph 4, *supra*. Our present thinking is that such a Federal prescription may be sustained with respect to States like New York, which do in fact have mass foreign-language news media capable of informing persons who are literate in languages other than English about public matters. But we are, as presently informed, sceptical about the reasonable basis for (and hence the validity of) this form of Federal intervention throughout the United States as a whole.

7. What we have said thus far is directed solely to the constitutionality of the proposed legislation. With respect to its desirability, we think that the bill might well help to simplify, and thus expedite, the enfranchisement of hundreds of thousands of Negroes who have not hitherto participated in the American political process. On the other hand, we would not wish enactment of legislation of this kind to undercut momentum for Federal civil rights legislation in those areas—such as discrimination in employment in industries affecting interstate commerce—in which Congress has thus far assumed no active responsibility.

Respectfully,

ALEXANDER M. BROCK.
LOUIS H. POLLAK.

VIEWS OF STATE GOVERNORS

LETTER FROM SUBCOMMITTEE CHAIRMAN SAM J. ERVIN, JR., TO THE GOVERNORS OF STATES WHICH HAVE A LITERACY TEST AS A PREREQUISITE FOR VOTING

FEBRUARY 27, 1962.

DEAR GOVERNOR: The Senate Subcommittee on Constitutional Rights, of which I am chairman, has scheduled tentatively hearings for the least 2 weeks in March on two bills, S. 480 and S. 2750, concerning literacy qualifications for voting. Copies of these bills are enclosed.

There are 19 States which have literacy requirements as a prerequisite for registering to vote. Since your State is one of the 19 and, therefore, would be affected by these bills, the subcommittee feels that we would be benefited by your views on these measures. Accordingly we invite you to appear as a witness at the hearings. The subcommittee will be pleased to have your attorney general, or any other official you might wish, accompany you. Should you be unable to attend, we shall be happy to hear any official whom you may designate to represent you.

The subcommittee expects to receive testimony from members of Congress and State officials during the first 3 days of the hearings, March 20, 21, and 22. On March 27, 28, and 29 we shall schedule appearances for representatives of organizations and private individuals. The subcommittee hopes that it will be convenient for you to appear. We shall arrange for your appearance, insofar as it is possible, at such time as you indicate is most convenient for you.

With all kind wishes, I am,

Sincerely yours,

SAM J. ERVIN, Jr., *Chairman.*

REPLIES FROM STATE GOVERNORS

ALASKA

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,
Juneau, March 29, 1962.

HON. SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: This acknowledges your letter of March 26 inviting me to appear before your committee to give my views on S. 480, S. 2750, and S. 2779, concerning qualifications for voting.

Sec. 1.01(5), chapter 83, SLA 1960 (Alaska's Election Code), provides that one of the qualifications for voting shall be: "An ability to read or speak the English language unless prevented by physical disability, or who legally voted in the general election of November 4, 1924," (emphasis supplied).

This appears to me to be more lenient than the provision common to the above mentioned bills stipulating completion of "the sixth primary grade in a school accredited by any State or by the District of Columbia," etc.

I therefore see no problem or conflict between this proposed legislation and the election code requirements for the State of Alaska.

Thank you for the opportunity to comment.

Sincerely,

WILLIAM A. EGAN, *Governor.*

ARIZONA

PHOENIX, ARIZ., March 20, 1962.

SAM J. ERVIN, Jr.,
*Chairman, Committee on the Judiciary, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.*

MY DEAR MR. CHAIRMAN: Your letter of recent date is gratefully acknowledged. Inasmuch as legislature is still in session it will not be possible for the Attorney General nor myself to attend subcommittee hearings. I am sure that members from Senator Hayden and Senator Goldwater's staff could acquaint you with the views that exist in Arizona on this situation.

PAUL FANNIN,
Governor of Arizona.

CALIFORNIA

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, March 16, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, U.S. Senate Subcommittee on Constitutional Rights, Senate Office
Building, Washington, D.C.

MY DEAR SENATOR ERVIN: Thank you for your recent letter inviting me to testify at hearings of the Senate Subcommittee on Constitutional Rights, on legislation concerning literacy tests for voter registration.

I deeply regret that I will be unable to make an appearance before your committee during the month of March, due to the fact that the California State Legislature is in session and my presence here is required.

I would like for you to know, however, that I have already communicated my views on this subject to President Kennedy.

Sincerely,

EDMUND G. BROWN, Governor.

CONNECTICUT

STATE OF CONNECTICUT,
EXECUTIVE CHAMBERS,
Hartford, March 12, 1962.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of February 28 inviting Connecticut representation at the hearings on S. 480 and S. 2750.

I have referred these matters to the Hon. Ella T. Grasso, secretary of state, who is charged with the responsibility for administering Connecticut's election laws, with the request that she review with the attorney general the impact on Connecticut of the proposed legislation.

Sincerely,

JOHN DEMPSEY, Governor.

STATE OF CONNECTICUT,
EXECUTIVE CHAMBERS,
Hartford, March 19, 1962.

Hon. SAM J. ERVIN, Jr.,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: This is to acknowledge your letter of March 13. I regret to advise you that a heavy schedule of prior commitments will make it impossible for me to appear before your honorable subcommittee.

Your letter has been brought to the attention of the Hon. Albert L. Coles, attorney general of the State of Connecticut, who is analyzing the impact on Connecticut of the proposed legislation in cooperation with the office of the secretary of state.

Sincerely,

JOHN DEMPSEY, Governor.

DELAWARE

STATE OF DELAWARE,
EXECUTIVE DEPARTMENT,
Dover, March 15, 1962.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of February 28, 1962, inviting me to appear as a witness at the hearings on S. 480 and S. 2750.

You may inform your committee that I have no objection to register relative to these measures and find that it is impossible for me to appear as a witness.

Your thoughtfulness in notifying me of this hearing and your kind invitation are sincerely appreciated.

Cordially yours,

ELBERT N. CARVEL, Governor.

GEORGIA

STATE OF GEORGIA,
OFFICE OF THE GOVERNOR,
Atlanta, March 9, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: This is to acknowledge and thank you for your letter of February 28. I have been out of the State for several days, thus the delay in replying.

Mr. Eugene Cook, the attorney general of Georgia, has been designated to appear as a witness at the hearings, and should have been in communication with you by now.

With my kindest personal regards and best wishes, I am,

Sincerely,

S. ERNEST VANDIVER, Governor.

MAINE

STATE OF MAINE,
OFFICE OF THE GOVERNOR,
Augusta, March 23, 1962.

HON. SAM J. ERVIN, Jr.,
U.S. Senator, Washington, D.C.

DEAR SENATOR ERVIN: I wish to acknowledge your recent correspondence in which you extend an invitation to me to personally appear before your subcommittee, or submit a statement to be made part of the official record of hearings, relative to S. 480 and S. 2750, concerning literacy qualifications for voting.

I have discussed this matter with our attorney general, Frank E. Hancock, and am informed that, in response to a similar request to him, he has recorded, by letter dated March 21, 1962, his observations relative to the pending bills.

After consultation on this matter, I wish to join in concurrence with the statement made by Attorney General Hancock on the above date.

With kind regards, I am,

Sincerely yours,

JOHN H. REED, Governor.

MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS,
EXECUTIVE DEPARTMENT,
Boston, March 26, 1962.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your kind notice of the Constitutional Rights Subcommittee hearings on S. 480 and S. 2750.

I regret to say that it is impossible for me to get to Washington at this time, because pressing matters of legislative action in my own proposals to our general court during this session require almost constant attention here in the Commonwealth.

These two bills have been noted by my legislative secretary, and I have asked him to follow their course through committee and keep me advised.

Sincerely,

JOHN A. VOLPE, Governor.

MISSISSIPPI

JACKSON, Miss., April 8, 1962.

HON. SAM J. ERVIN, Jr.,
Senator, Constitutional Rights Subcommittee,
Senate Office Building, Washington, D.C.:

It is a matter of utmost concern and alarm to those of us who have always been taught and led by the courts to believe that the Constitution of the United States is the law of the land, to learn that the Congress of the United States,

in violation of that Constitution, is considering the passage of legislation prescribing the qualifications of voters in the respective States.

It is clearly provided by article I, section 2, clause 1 of the Federal Constitution that:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The 17th amendment, clause 1, to the Federal Constitution provides: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The qualifications of the electors in each State requisite for the election of the most numerous branch of the State legislature have been fixed by the constitutions and statutes of the various States. In Mississippi, sections 241, 242, and 243 of the constitution of 1890 provide the requisite qualifications of voters. The constitutionality of these sections has been upheld by the Supreme Court of the United States in *Williams v. Mississippi*, 731 M. 820, 20 So. 826, affirmed 170 U.S. 213, 42 L. ed. 102, 18 S. Ct. 583.

The Congress should bear in mind that the franchise is not a right of citizenship. It is only a political privilege conferred by a State upon such of its members as it deems fit to exercise such a privilege within the constitutional limits. Voters and citizens are not the same. Only those upon whom the State, under the reserved powers of the States, sees fit to confer the right of suffrage may assert any claim to such right.

In the case of *S. Carolina v. U.S.*, 190 U.S. 437, the court said: "It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with facts of political life as they understood them, putting into form the government they are creating, and prescribing in language clear and intelligible, the powers that government was to make." Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1183, declared: "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed the Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they said."

It would be indeed strange for the Members of the Congress, who are required by article 6, clause 3 of the Federal Constitution, before entering upon their duties of office to take an oath to support the Constitution, to find themselves joining the ranks of those opposing the Constitution by passing an act such as the one now under consideration, that is so clearly in violation of the constitutional mandate.

Let me urge upon the Members of Congress that the preservation of the dignity and sovereignty of the States, within the limits of the constitutional powers, is of the utmost importance to the welfare and continued progress of the Nation. It is most vital to the preservation of our constitutional form of government that has made of us the mighty nation that we are. Congress should not permit itself to be driven by hardships, real or supposed, of particular cases to accomplish results, even if they might be just results, in a manner forbidden by the fundamental law of the land as prescribed by our Constitution.

The citizens of our Nation should be encouraged in their reliance upon their safety guaranteed by our Constitution and should never be given, by the Government or any of its departments, any basis for a justified fear that our Constitution is being gradually or speedily amended, at the behest of those in power, by any ingenious or unreasonable construction of its provisions. The National Government can never become the agent of the State and exercise the constitutional functions of the State without a complete destruction of the Federal State as we know it.

Let me urge upon the Congress that it render unto the States the things that are specifically reserved and belong to the States and render unto the Federal Government the things that are specifically reserved and belong to the Federal Government.

ROSS R. BARNETT,
Governor of Mississippi.

NEW YORK

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
Albany, March 22, 1962.

HON. SAM J. ERVIN, JR.,
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary,
Senate Office Building, Washington, D.C.*

DEAR SENATOR ERVIN: Thank you for your recent letters inviting me to appear at the hearings of the Senate Subcommittee on Constitutional Rights which is considering Federal legislation relating to literacy qualifications for voting.

I regret that I will be unable to attend the hearings scheduled by your subcommittee, but I appreciate this opportunity to restate my position, and that of the Republican Party, on the urgent necessity to assure voting rights to all of our citizens.

The Republican platform of 1960 pledged: "Legislation to provide that the completion of six primary grades in a State-accredited school is conclusive evidence of literacy for voting purposes."

This is a requisite and essential step to prevent a reasonable literacy requirement from being distorted and used as an instrument of discrimination. I am pleased that in my own State the board of regents, which administers the literacy tests for voting under New York law, has for many years prescribed tests at the sixth grade level of difficulty.

This approach, however, is aimed at but one of many devices which may be used to deprive qualified citizens of their right to vote. The 1961 Report on Voting by the U.S. Commission on Civil Rights concluded that discriminatory disfranchisement is confined exclusively to eight Southern States and that it can take many forms. Arbitrary registration procedures, economic reprisals, and discriminatory purges from the registration rolls—some of which are undertaken with official State encouragement—are cited by the Commission as additional methods used to deprive certain qualified citizens of their right to vote. It appears that the 1957 and 1960 Civil Rights Acts—the first national civil rights laws enacted after 70 years—must be strengthened by imaginative measures broad enough promptly to eliminate such denials of constitutional rights.

I would hope that the Congress would not limit its concern in this area to the denial of voting rights, which is but one of several fundamental rights of which certain of our citizens are being deprived. Specifically, I urge that action be taken on the detailed recommendations of the U.S. Commission on Civil Rights concerning discrimination in housing, employment, education, and the enforcement of the laws.

Only by attacking the entire spectrum of discriminatory practices can the American promise of equality and dignity for every citizen be fulfilled.

Sincerely,

NELSON A. ROCKEFELLER, *Governor.*

NORTH CAROLINA

STATE OF NORTH CAROLINA,
GOVERNOR'S OFFICE,
Raleigh, March 13, 1962.

HON. SAM J. ERVIN, JR.
U.S. Senate, Senate Office Building, Washington, D.C.

DEAR SAM: Thank you very much for your letter telling me of the hearings of the Senate Subcommittee on Constitutional Rights tentatively scheduled for the last 2 weeks in March and your invitation for me to attend these hearings.

I wish very much I could be there, but I have too many engagements to get to Washington at that time. I am asking Attorney General Wade Bruton to go. Thank you for sending copies of the bills.

With best wishes always,

Sincerely,

TERRY SANFORD, *Governor.*

OREGON

STATE OF OREGON,
OFFICE OF THE GOVERNOR,
Salem, March 14, 1962.

HON. SAM J. ERVIN, Jr.
Chairman, Senate Subcommittee on Constitutional Rights,
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: You have invited me to appear at the hearings next week on S. 480 and S. 2750, concerning literacy qualifications for voting. I regret that it will be impossible for me to do so, but I am glad to submit the following observations about the proposed legislation.

The Oregon constitution (art. III, sec. 2), requires that, as a prerequisite to voting, a citizen must be "able to read and write the *English* language." [Emphasis supplied.] This provision would not be compatible with the special Spanish-language provisions of S. 2750.

Since the voting privilege is highly prized, removal of the *English* literacy requirement would discourage acquisition of reading ability in our national language. It is not to be overlooked that foreign-language sources of political information are substantially more limited than is the case in English. With respect to this special aspect of S. 2750, I would ask two questions: (1) Is it in the *national* interest? and (2) if the provision is appropriate for Spanish-speaking citizens, should it not be extended to other non-English-speaking citizens?

One possible modification of S. 2750 would be to insist that persons literate in a language other than English be allowed to vote, provided the official ballots are printed in the language in which they are literate. (This would be especially appropriate should Puerto Rico be granted statehood.)

With respect to the remainder of the provisions of S. 480 and S. 2750, Oregon would encounter minimal difficulty. The literacy test, as defined by statute, requires only the ability of a voter to sign his name and to read (in English) "a paragraph of his own choosing from any available printed matter." (Oregon revised statutes, sec. 247.181.) Since graduation from sixth grade virtually assures such ability, the proposed Federal requirement would be a reasonable alternative.

However, in completing his registration, Oregon law requires (Oregon revised statutes sec. 247.171) that "the elector shall read the warning" on the registration card that advises him of the penalties for supplying false information, knowing it to be false, in seeking registration for voting. Oregon law could be modified to require that the prospective voter be informed by the registrar of the penalties but their reading by the would-be elector is more effective in achieving the purpose of this procedure.

Since neither of the bills would affect discriminatory treatment of non-sixth-grade graduates of equal literacy, I suggest that the requirement of a very simple test (of the Oregon type) would be even more effective in achieving the purposes of their authors.

I am appreciative of the opportunity to submit these comments and I am pleased that such legislation is receiving serious consideration by the Senate.

Sincerely,

MARK O. HATFIELD, Governor.

STATE OF OREGON,
OFFICE OF THE GOVERNOR,
Salem, March 22, 1962.

HON. SAM J. ERVIN, Jr.
The United States Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Your invitation to appear before your committee concerning S. 480 and S. 2750 is sincerely appreciated. Unfortunately my schedule will not permit my being present, nor am I in a position to have a representative appear in my behalf.

Thank you again for your thoughtfulness.

Sincerely yours,

MARK O. HATFIELD, Governor.

VIRGINIA

COMMONWEALTH OF VIRGINIA,
GOVERNOR'S OFFICE,
Richmond, March 5, 1962.

HON. SAM J. ERVIN, Jr.
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: I have your letter of February 28 with reference to the hearings before the Senate Subcommittee on Constitutional Rights on March 20, 21, and 22.

I am still in the midst of a regular session of the general assembly and it is doubtful that I will be able to attend and testify. However, I am referring your letter to the attorney general of Virginia and it may be that I will submit a statement and have someone from that office appear. We will advise you further in the near future.

With kindest regards, I am

Sincerely,

A. S. HARRISON, Jr., Governor.

WASHINGTON

STATE OF WASHINGTON,
EXECUTIVE DEPARTMENT,
Olympia, March 9, 1962.

HON. SAM J. ERVIN, Jr.
Chairman, Subcommittee on Constitution Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This is to thank you for your letter of February 28 and the opportunity to present my opinions on S. 480 and S. 2750 at a hearing of your subcommittee. I have discussed these bills and the literacy qualifications which they would set forth for voters with the secretary of state, who also is supervisor of elections. We concluded that the two Senate proposals would have such minor application to this State's voting laws that it probably would be unnecessary for us to send a representative to testify.

Washington, as you pointed out in your letter, is 1 of 19 States which have literacy requirements which those registering to vote must meet. Article 6, section 1, of the State constitution provides that each elector "shall be able to read and speak the English language." The actual literacy "test" as contained in RCW 29.07.070 merely provides that the prospective voter must be able to read and speak the English language well enough to comprehend ordinary prose. The registration officer may require the applicant to read and explain a short passage.

Essentially, the Senate bills provide that insofar as literacy is concerned completion of the sixth primary grade at any accredited private or public school shall be accepted as prima facie evidence that the person is competent to vote. Since there are so few illiterate persons in Washington State, coupled with the fact that no complaints have ever been made to the injustice of our State's literacy standard, the two Senate bills would be of little concern to the overwhelming majority of citizens.

However, I am keenly aware of the importance of the right of individuals to vote and of the importance of these proposed pieces of legislation. Therefore, I wholeheartedly support the principles which are recognized in these two Senate bills and give my official endorsement. I regret to inform you, however, that it will not be possible for me to journey to Washington, D.C., to testify because of the tremendous demands being made on my time as a result of the Seattle World's Fair.

In conclusion, may I thank you once again for the opportunity to appear before your committee.

Kind regards.

Sincerely yours,

ALBERT D. ROSKILLINI, Governor.

WYOMING

STATE OF WYOMING,
EXECUTIVE DEPARTMENT,
Cheyenne, March 6, 1962.

HON. SAM J. ERVIN, JR.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I want to thank you for your letter of February 28 and the invitation to present testimony on the two bills, S. 480 and S. 2750, which relate to literacy qualifications for voting.

Article 6, section 9, of the Wyoming constitution is quoted as follows: "No person shall have the right to vote who shall not be able to read the constitution of this State. The provisions of this section shall not apply to any person prevented by physical disability from complying with its requirements."

On the assumption that persons completing six grades of primary education in State accredited schools can reasonably be expected to be literate and be able to read the State constitution in English, my study of the measures indicates the only literacy qualification to vote in Wyoming is more liberal than the proposals. Our constitutional requirement does not preclude nor question the right to vote of the self-educated man with little or no formal schooling, when he can read the English language, nor does it disqualify the naturalized citizen educated in a foreign country who can read English, when otherwise qualified by law.

If I have misinterpreted the intent of the bills, I shall be pleased to hear from you. Your invitation to testify is appreciated but there does not appear to be a conflict with Wyoming's constitutional requirement.

Sincerely yours,

JACK R. GAGE, Governor.

1959 REPORT, BY U.S. COMMISSION ON CIVIL RIGHTS: PROPOSAL FOR A CONSTITUTIONAL AMENDMENT TO ESTABLISH UNIVERSAL SUFFRAGE (PP. 97-99)

(By Chairman Hannah and Commissioners Heeburgh and Johnson)

The Commission's recommendation for temporary Federal registration should, if enacted by Congress, secure the right to vote in the forthcoming national elections for many qualified citizens who would otherwise, because of their race or color, be denied this most fundamental of American civil rights. But the proposed measure is clearly a stopgap.

In its investigations, hearings, and studies the Commission has seen that complex voter qualification laws, including tests of literacy, education, and "interpretation," have been used and may readily be used arbitrarily to deny the right to vote to citizens of the United States.

Most denials of the right to vote are in fact accomplished through the discriminatory application and administration of such State laws. The difficulty of proving discrimination in any particular case is considerable. It appears to be impossible to enforce an impartial administration of the literacy tests now in force in some States, for where there is a will to discriminate, these tests provide the way.

Therefore, as the best ultimate solution of the problem of securing and protecting the right to vote, we propose a constitutional amendment to establish a free and universal franchise throughout the United States.

An important aim of this amendment would be to remove the occasion for further direct Federal intervention in the States administration and conduct of elections, by prohibiting complex voting requirements and providing clear, simple, and easily enforceable standards.

The proposed constitutional amendment would give the right to vote to every citizen who meets his State's age and residence requirements and who is not legally confined at the time of registration or election.

Age and residence are objective and simple standards. With only such readily ascertainable standards to be met, the present civil remedies of the Civil Rights Act should prove more effective in any future cases of discriminatory application. A court injunction could require the immediate registration of any person who meets these clear-cut State qualifications.

The proposed amendment is in harmony with the American tradition and with the trend in the whole democratic world. As noted in the beginning of this section of the Commission's report, the growth of American democracy has been marked by a steady expansion of the franchise; first by the abandonment of property qualifications and then by conferral of suffrage upon the two great disfranchised groups, Negroes and women. Only 19 States now require that voters demonstrate their literacy. Michigan, New Hampshire, Pennsylvania, Tennessee, and Vermont have suffered no apparent harm from absence of the common provisions disqualifying mental incompetents. With minor exceptions, mostly involving election offenses, Colorado, Maine, Massachusetts, Michigan, Pennsylvania, Utah, Vermont, and West Virginia have no provisions barring certain ex-convicts from the vote, and of the States who do have such provisions, all but eight also provide for restoration of the former felon's civil rights. In only five States is the payment of a poll tax still a condition upon the suffrage.

The number of Americans disqualified under each of these categories is very small compared with the approximately 90 million now normally qualified to vote. It is also small in relation to the numbers of qualified nonwhite citizens presently being disfranchised by the discriminatory application of these complex laws. The march of education has almost eliminated illiteracy. In a nation dedicated to the full development of every citizen's human potential, there is no excuse for whatever illiteracy that may remain. Ratification of the proposed amendment would, we believe, provide an additional incentive for its total elimination. Meanwhile, abundant information about political candidates and issues is available to all by way of television and radio.

We believe that the time has come for the United States to take the last of its many steps toward free and universal suffrage. The ratification of this amendment would be a reaffirmation of our faith in the principles upon which this Nation was founded. It would reassure lovers of freedom throughout a world in which hundreds of millions of people, most of them colored, are becoming free and are hesitating between alternative paths of national development.

For all these reasons we propose the following 23d amendment to the Constitution of the United States.

"ARTICLE XXIII

"SECTION 1

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or by any person for any cause except inability to meet State age or length-of-residence requirements uniformly applied to all persons within the State, or legal confinement at the time of registration or election. This right to vote shall include the right to register or otherwise qualify to vote, and to have one's vote counted.

"SECTION 2

"The Congress shall have power to enforce this article by appropriate legislation.

SEPARATE STATEMENT REGARDING PROPOSED XXIII AMENDMENT

(By Vice Chairman Storey and Commissioner Carlton)

We strongly believe in the right of every qualified citizen of the United States, irrespective of his color, race, religion, or national origin, to register, vote, and have his vote counted. We regard full protection of these rights of suffrage by both State and Federal Governments necessary and proper. Therefore, we have supported and voted for all recommendations of the Commission (except the proposed 23d amendment) to strengthen the laws and improve the administration of registration and voting procedures. However, we cannot join our distinguished colleagues in the recommendation of the proposed constitutional amendment. These are our several reasons:

1. We believe that our Commission recommendations, if enacted into law and properly enforced, will eliminate most if not all of the restrictions on registration and voting by reason of race, color, religion, or national origin.

A recommendation proposing a constitutional amendment granting additional power to the Federal Government would be in order only if we had found a lack of power under existing constitutional provisions. Such is not the case.

2. On principle, proposals for constitutional amendments which would alter long-standing Federal-State relationships, such as the constitutional provision that matters pertaining to the qualifications of electors shall be left to the several States, should not be proposed in the absence of clear proof that no other action will correct an existing evil. No such proof is apparent.

3. The Constitution of the United States of America presently includes sufficient authority to the Federal Government to enable it effectively to deal with denials of the right to vote by reason of race, color, religion, and national origin.

4. The information and findings cited in support of the proposed 23d amendment disclose that some illiteracy still exists, that authoritative State statistics and studies are wholly lacking to support such an important proposal, and that our staff has not had the opportunity to make a thorough study of such a far-reaching proposal.

* * * * *

I heartily agree with the objections of Commissioners Storey and Carlton to the proposed Constitutional amendment.

JOHN S. BATTLE, *Commissioner.*

1961 REPORT ON VOTING, BY U.S. COMMISSION ON CIVIL RIGHTS: RECOMMENDATIONS (PP. 139-142)

RECOMMENDATIONS

QUALIFICATION OF VOTERS

Recommendation 1.—That Congress, acting under section 2 of the 15th amendment and sections 2 and 5 of the 14th amendment, (a) declare that voter qualifications other than age, residence, confinement, and conviction of a crime are susceptible of use, and have been used, to deny the right to vote on grounds of race and color; and (b) enact legislation providing that all citizens of the United States shall have a right to vote in Federal or State elections which shall not be denied or in any way abridged or interfered with by the United States or by any State for any cause except for inability to meet reasonable age or length-of-residence requirements uniformly applied to all persons within a State, legal confinement at the time of registration or election, or conviction of a felony; such right to vote to include the right to register or otherwise qualify to vote, and to have one's vote counted.

DISSENT TO RECOMMENDATION 1 BY VICE CHAIRMAN STOREY

As pointed out in the 1960 report of this Commission, I strongly believe in the right of every qualified citizen of the United States, irrespective of his color, race, religion, or national origin, to register, vote, and have his vote counted. Full protection of these rights of suffrage by both State and Federal Governments is necessary and proper. However, I cannot join in so sweeping a recommendation as this.

Proposals to alter longstanding Federal-State relationships such as that incorporated in the Federal Constitution, declaring that the qualifications of electors shall be left to the several States, should not be made unless there is no alternative method to correct an existing evil. Such is not the case today.

The Federal Government has sufficient authority under the Constitution and the existing framework of laws to enable it effectively to deal with denials of the right to vote by reason of race, color, religion, and national origin.

The Civil Rights Act of 1957 authorized the Attorney General to institute civil suit in the Federal courts to prevent the denial of voting rights. The Civil Rights Act of 1960 provides that if in any such suit the court make a finding that the denial of voting rights is "pursuant to a pattern or practice," the court may appoint voting referees to register qualified persons denied this right by local election officials. The further denial of the right to vote to these persons so registered by the court-appointed voting referees constitutes contempt of court and is punishable accordingly. The vigor with which these Civil Rights Acts are applied will significantly affect the extent to which voting denial practices will be discontinued.

Many States have voting requirements more extensive than age or length of residence, incarceration, or felony convictions. These qualifications, having nothing to do with race, religion, or national origin, are an important element in preserving the sanctity of the ballot. They are specific disqualifications which are felt justifiable for the good of the State. Disqualifications of persons whose mental condition makes it impossible for them competently to exercise the discrimination necessary in voting has long been accepted. Many States disqualify paupers supported by municipal or county officials on the theory that these people are too easily exploitable by such officials for their own purposes. The security and purity of the ballot can be destroyed by permitting illiterates to vote. And as the English language is still the official language of the United States, there is a good justification for States requiring that voters have at least a rudimentary knowledge of this language.

DISSENT TO RECOMMENDATION 1 BY COMMISSIONER RANKIN

I join in the dissenting statement of Vice Chairman Storey, but would add the following personal comment.

The 15th amendment has been a part of our Constitution for almost a century, and Congress has never interpreted it as a mandate to usurp the power of each State to determine the qualifications of electors.

In 1957 and again in 1960, Congress did enact legislation to provide protection of the right to register and vote without discrimination on grounds of race, color, or previous condition of servitude. It may be that further legislation will be required to reinforce the guarantees of the 15th amendment and of the 1957 and 1960 laws. But such measures should be kept within the well-recognized bounds of our Constitution and laws.

Our object must be compliance with the Constitution, not punishment, and for that reason I do not deem it wise to upset the balance of our Federal system to reach a result which can be achieved through less drastic means.

Recommendation 2.—That Congress enact legislation providing that in all elections in which, under State law, a "literacy" test, an "understanding" or "interpretation" test, or an "educational" test is administered to determine the qualifications of electors, it shall be sufficient for qualification that the elector have completed at least six grades of formal education.

INTERFERENCE WITH THE RIGHT TO VOTE

Recommendation 3.—That Congress amend subsection (b) of 42 U.S.C. 1971 to prohibit any arbitrary action or (where there is a duty to act) arbitrary inaction which deprives or threatens to deprive any person of the right to register, vote, and have that vote counted in any Federal election.

DILUTION OF THE RIGHT TO VOTE

Recommendation 4.—That Congress consider the advisability of enacting legislation (a) requiring that where voting districts are established within a State, for either Federal elections or State elections to any house of a State legislature which is elected on the basis of population, they shall be substantially equal in population; and (b) specifically granting the Federal courts jurisdiction of suits to enforce the requirements of the Constitution and of Federal law with regard to such electoral districts; but explicitly providing that such jurisdiction should not be deemed to preclude the jurisdiction of State courts to enforce rights provided under State law regarding such districts.

STATISTICAL INFORMATION

Recommendation 5.—That Congress direct the Bureau of the Census promptly to initiate a nationwide compilation of registration and voting statistics, to include a count of persons of voting age in every State and territory by race, color, and national origin, who are registered to vote, and a determination of the extent to which such persons have voted since January 1, 1960; and requiring that the Bureau of the Census compile such information in each next succeeding decennial census, and at such other time or times as the Congress may direct.

CIVIL RIGHTS ACT OF 1957

Public Law 85-315

85th Congress, H.R. 6127

September 9, 1957

AN ACT To provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

PART I—ESTABLISHMENT OF THE COMMISSION ON CIVIL RIGHTS

SEC. 101. (a) There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").

(b) The Commission shall be composed of six members who shall be appointed by the President by and with the advice and consent of the Senate. Not more than three of the members shall at any one time be of the same political party.

(c) The President shall designate one of the members of the Commission as Chairman and one as Vice Chairman. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman, or in the event of a vacancy in that office.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner, and subject to the same limitation with respect to party affiliations as the original appointment was made.

(e) Four members of the Commission shall constitute a quorum.

RULES OF PROCEDURE OF THE COMMISSION

SEC. 102. (a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses.

(f) Except as provided in sections 102 and 105(f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpoena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than \$1,000, or imprisoned for not more than one year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

(j) A witness attending any session of the Commission shall receive \$4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of \$12 per day for expenses of subsistence,

including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

(k) The Commission shall not issue any subpoena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpoenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 103. (a) Each member of the Commission who is not otherwise in the service of the Government of the United States shall receive the sum of \$50 per day for each day spent in the work of the Commission, shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of \$12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

(b) Each member of the Commission who is otherwise in the service of the Government of the United States shall serve without compensation in addition to that received for such other service, but while engaged in the work of the Commission shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of \$12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

DUTIES OF THE COMMISSION

SEC. 104. (a) The Commission shall—

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from the date of the enactment of this Act.

(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

POWERS OF THE COMMISSION

SEC. 105. (a) There shall be a full-time staff director for the Commission who shall be appointed by the President by and with the advice and consent of the Senate and who shall receive compensation at a rate, to be fixed by the President, not in excess of \$22,500 a year. The President shall consult with the Commission before submitting the nomination of any person for appointment to the position of staff director. Within the limitations of its appropriations, the Commission may appoint such other personnel as it deems advisable, in accordance with the civil service and classification laws, and may procure services as authorized by section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a), but at rates for individuals not in excess of \$50 per diem.

(b) The Commission shall not accept or utilize services of voluntary or uncompensated personnel, and the term "whoever" as used in paragraph (g) of section 102 hereof shall be construed to mean a person whose services are compensated by the United States.

(c) The Commission may constitute such advisory committees within States composed of citizens of that State and may consult with governors, attorneys general, and other representatives of State and local government, and private organizations, as it deems advisable.

(d) Members of the Commission, and members of advisory committees constituted pursuant to subsection (c) of this section, shall be exempt from the operation of sections 281, 283, 284, 434, and 1914 of title 18 of the United States Code, and section 190 of the Revised Statutes (5 U.S.C. 99).

(e) All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.

(f) The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 102(j) and (k) of this Act, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

(g) In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPROPRIATIONS

SEC. 106. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, so much as may be necessary to carry out the provisions of this Act.

PART II—TO PROVIDE FOR AN ADDITIONAL ASSISTANT ATTORNEY GENERAL

SEC. 111. There shall be in the Department of Justice one additional Assistant Attorney General, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall assist the Attorney General in the performance of his duties, and who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General.

PART III—TO STRENGTHEN THE CIVIL RIGHTS STATUTES, AND FOR OTHER PURPOSES

SEC. 121. Section 1343 of title 28, United States Code, is amended as follows:

(a) Amend the catch line of said section to read,

"§ 1343. Civil rights and elective franchise"

(b) Delete the period at the end of paragraph (3) and insert in lieu thereof a semicolon.

(c) Add a paragraph as follows:

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

SEC. 122. Section 1969 of the Revised Statutes (42 U. S. C. 1993) is hereby repealed.

PART IV—TO PROVIDE MEANS OF FURTHER SECURING AND PROTECTING THE RIGHT TO VOTE

SEC. 131. Section 2004 of the Revised Statutes (42 U. S. C. 1971), is amended as follows:

(a) Amend the catch line of said section to read, "Voting rights".

(b) Designate its present text with the subsection symbol "(a)".

(c) Add, immediately following the present text, four new subsections to read as follows:

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general,

special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"(d) The district courts of the United States shall have jurisdictions of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

"(e) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel."

PART V—TO PROVIDE TRIAL BY JURY FOR PROCEEDINGS TO PUNISH CRIMINAL CONTEMPTS OF COURT GROWING OUT OF CIVIL RIGHTS CASES AND TO AMEND THE JUDICIAL CODE RELATING TO FEDERAL JURY QUALIFICATIONS

SEC. 151. In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of \$1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of \$300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

SEC. 152. Section 1861, title 28, of the United States Code is hereby amended to read as follows:

"§ 1861. Qualifications of Federal Jurors

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

"(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak, and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

SEC. 161. This Act may be cited as the "Civil Rights Act of 1957".

Approved September 9, 1957.

CIVIL RIGHTS ACT OF 1960

Public Law 86-449

86th Congress, H.R. 8001

May 6, 1960

AN ACT To enforce constitutional rights, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1960".

TITLE I

OBSTRUCTION OF COURT ORDERS

SEC. 101. Chapter 73 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

“§ 1500. Obstruction of court orders

“Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

“No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.”

SEC. 102. The analysis of chapter 73 of such title is amended by adding at the end thereof the following:

“1500. Obstruction of court orders.”

TITLE II

FLIGHT TO AVOID PROSECUTION FOR DAMAGING OR DESTROYING ANY BUILDING OR OTHER REAL OR PERSONAL PROPERTY; AND, ILLEGAL TRANSPORTATION, USE, OR POSSESSION OF EXPLOSIVES; AND, THREATS OR FALSE INFORMATION CONCERNING ATTEMPTS TO DAMAGE OR DESTROY REAL OR PERSONAL PROPERTY BY FIRE OR EXPLOSIVES

SEC. 201. Chapter 49 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

“§ 1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property

“(a) Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody, or confinement after conviction, under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution, public or private, or (2) to avoid giving testimony in any criminal proceeding relating to any such offense shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

“(b) Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: *Provided, however,* That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section.”

SEC. 202 The analysis of chapter 49 of such title is amended by adding thereto the following:

“1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property.”

SEC. 203. Chapter 39 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

“§ 837. Explosives; illegal use or possession; and, threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives

"(a) As used in this section—

" 'commerce' means commerce between any State, Territory, Commonwealth, District, or possession of the United States, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession of the United States, or the District of Columbia;

" 'explosive' means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds or mechanical mixture that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound or mixture or any part thereof may cause an explosion.

"(b) Whoever transports or aids and abets another in transporting in interstate or foreign commerce any explosive, with the knowledge or intent that it will be used to damage or destroy any building or other real or personal property for the purpose of interfering with its use for educational, religious, charitable, residential, business, or civic objectives or of intimidating any person pursuing such objectives, shall be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both; and if personal injury results shall be subject to imprisonment for not more than ten years or a fine of not more than \$10,000, or both; and if death results shall be subject to imprisonment for any term of years or for life, but the court may impose the death penalty if the jury so recommends.

"(c) The possession of an explosive in such a manner as to evince an intent to use, or the use of, such explosive, to damage or destroy any building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives or to intimidate any person pursuing such objectives, creates rebuttable presumptions that the explosive was transported in interstate or foreign commerce or caused to be transported in interstate or foreign commerce by the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it: *Provided, however,* That no person may be convicted under this section unless there is evidence independent of the presumptions that this section has been violated.

"(d) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully imparts or conveys, or causes to be imparted or conveyed, any threat, or false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to damage or destroy any building or other real or personal property for the purpose of interfering with its use for educational, religious, charitable, residential, business, or civic objectives, or of intimidating any person pursuing such objectives, shall be subject to imprisonment for not more than one year or a fine of not more than \$1,000, or both.

"(e) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, Territory, Commonwealth, or possession of the United States, and no law of any State, Territory, Commonwealth, or possession of the United States which would be valid in the absence of the section shall be declared invalid and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section."

SEC. 204. The analysis of chapter 39 of title 18 is amended by adding thereto the following:

"837. Explosives; illegal use or possession; and threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives."

TITLE III

FEDERAL ELECTION RECORDS

SEC. 301. Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for,

all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Sec. 302. Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Sec. 303. Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

Sec. 304. Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

Sec. 305. The United States district court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

Sec. 306. As used in this title, the term "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

TITLE IV

EXTENSION OF POWERS OF THE CIVIL RIGHTS COMMISSION

SEC. 401. Section 105 of the Civil Rights Act of 1957 (42 U.S.C. Supp. V 1975d) (71 Stat. 635) is amended by adding the following new subsection at the end thereof:

"(h) Without limiting the generality of the foregoing, each member of the Commission shall have the power and authority to administer oaths or take statements of witnesses under affirmation."

TITLE V

EDUCATION OF CHILDREN OF MEMBERS OF ARMED FORCES

SEC. 501. (a) Subsection (a) of section 6 of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), as amended, relating to arrangements for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children."

(b) (1) The first sentence of subsection (d) of such section 6 is amended by adding before the period at the end thereof: "or, in the case of children to whom the second sentence of subsection (a) applies, with the head of any Federal department or agency having jurisdiction over the parents of some or all of such children".

(2) The second sentence of such subsection (d) is amended by striking out "Arrangements" and inserting in lieu thereof "Except where the Commissioner makes arrangements pursuant to the second sentence of subsection (a), arrangements".

SEC. 502. Section 10 of the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), as amended, relating to arrangements for facilities for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements may also be made to provide, on a temporary basis, minimum school facilities for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children."

TITLE VI

SEC. 601. That section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), is amended as follows:

(a) Add the following as subsection (e) and designate the present subsection (e) as subsection "(f)":

"In any proceeding instituted pursuant to subsection (e) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise

to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard *ex parte* at such times and places as the court shall direct. His statement under oath shall be *prima facie* evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

"The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally; *Provided, however*, That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist."

(b) Add the following sentence at the end of subsection (c) :

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

TITLE VII

SEPARABILITY

SEC. 701. If any provision of this Act is held invalid, the remainder of this Act shall not be affected thereby.

Approved May 6, 1960.

FEDERAL STATUTES CONCERNING VOTING RIGHTS

CIVIL: 42 U.S.C. SEC. 1971—VOTING RIGHTS

(a) Race, color, or previous condition not to affect right to vote.

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(b) Intimidation, threats, or coercion.

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possession, at any general, special, or primary election held solely or in part for the purpose of the selecting or electing any such candidate.

(c) Preventive relief; injunction; costs.

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.¹

(d) Jurisdiction; exhaustion of other remedies.

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(See Public Law 86-449, 86th Cong., for amendment which has been designated subsection (e).)

(f) Contempt; assignment of counsel; witnesses.

Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which

¹ Public Law 86-449, 86th Cong., p. 7, May 6, 1960, for amendment pertaining to state as party defendant.

he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defence to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearings, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel." As amended Sept. 9, 1957, Pub. L. 85-315, Part IV, § 131, 71 Stat. 637.

SEC. 1995. Criminal contempt proceedings: penalties: trial by jury.

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of \$1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of \$300 or imprisonment in excess of forty-five days the accused in said proceeding, upon demand therefor shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention. Pub. L. 85-315, Part V, § 151, Sept. 9, 1957, 71 Stat. 638.

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. R.S. § 1979.

CRIMINAL—TITLE 18, U.S.C., SECS. 241-242

Section 241. Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

Section 242. Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

ARTICLES AND AMENDMENTS OF THE U.S. CONSTITUTION RELEVANT TO S. 480, S. 2750, AND S. 2979.

ARTICLE I

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

SECTION 8, CLAUSE 18. Congress shall have power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE II

SECTION 1, CLAUSE 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FIFTEENTH AMENDMENT

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

SEVENTEENTH AMENDMENT

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

NINETEENTH AMENDMENT

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

